(2)

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

JOHN KENNETH STEIN,

Petitioner,

v.

WILLIAM D. ROBISON *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari To the Washington Court of Appeals Division Two

APPENDIX

THOMAS F. CLINE
5308 BALLARD AVENUE N.W.
SEATTLE, WA 98107
(206) 789-2777

COUNSEL FOR PETITIONER

11-1-02

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WASHINGTON COURT OF APPEALS
DIVISION TWO

In re the Estate of	)	
	)	
NICHOLAS A. STEIN,	)	No. 16381-1-II
	)	
Deceased.	)	
	)	

INTERLOCUTORY OPINION
PUBLISHED AT 896 P.2d 740
JUNE 22, 1995

BRIDGEWATER, J. — Jack K. Stein appeals from a summary judgment in favor of his children, John Stein and Tami Stein, barring from probate a document Jack asserts is the 1987 will of Nicholas A. Stein. We reverse and remand.

The decedent, Jack's father and John and Tami's grandfather, died in Clark County on August 23, 1987, leaving an estate valued at over $3,000,000. A few days after the decedent's death, Jack filed a will dated March 17, 1987 in Multnomah County, Oregon, which was admitted to probate. The order admitting the will to probate declared that this 1987 will was the last will and testament of the deceased. The period wherein a challenge could have been made by John and Tami to contest the will then lapsed. Respondents assert that although assets were transferred from Washington to Oregon after his death, Nicholas Stein owned no assets in Oregon at the time of his death.

On March 7, 1988, a petition to probate a will dated July 3, 1984, was made to the Superior Court of Clark County, Washington, and the court ordered the 1984 will admitted to probate. This order declared that the 1984 will was the last will and testament of the deceased. Thereafter, Jack had 4 months during which he could have brought a will contest, but did not. The 1987 will is more favorable to Jack, while the 1984 will is more favorable to John and Tami.

In Washington, Christopher Welch, Jack's stepson-in-law, was appointed as the personal representative of the Washington probate. Meanwhile, Oregon appointed Jack as the personal representative of the 1987 will. Oregon later replaced Jack as personal representative with Richard E. Paul, who in October 1988 petitioned Oregon to close probate proceedings and transfer all assets to Washington. On November 30, 1988, Oregon approved the final accounting of the estate and ordered the following:

> IT APPEARING TO THE COURT, That at the time of his death said NICHOLAS A. STEIN was a resident and inhabitant of the State of Washington, as more particularly appears in the affidavit of Christopher D. Welch, on file herein; that as the estate of said decedent should properly be probated in the State of Washington rather than the State of Oregon, a final account was filed herein;...
>
> IT IS FURTHER ORDERED, That the residue of said estate be paid and distributed

> to CHRISTOPHER D. WELCH, personal representative of the Estate of NICHOLAS A. STEIN, deceased, in the State of Washington, for final settlement and distribution as may be determined by the Courts of that State.

No further action took place in Oregon.

Nearly a year later, in August 1989, Washington personal representative Welch petitioned the Washington court for instructions, alleging he was uncertain as to which will was the last will of the decedent. On December 20, 1989, Jack challenged the 1984 will in Washington in a "Motion to Revoke and Annul Will and Probate".

Recognizing the confusion surrounding the two wills, on December 22, 1989, Clark County Superior Court Judge Robert Harris entered an "Order Requiring Action On Will". This order required Welch to "procure from Oregon Circuit Court an exemplified copy of the 1987 Will and enter it of record in this proceeding for the Will". Judge Harris also ordered

> Any person or persons desiring the probate and execution of the 1987 Will, or any other document purporting to be the last will and testament of the decedent, Nicholas A. Stein, shall have four months from the date of first publication of the notice or four months after the date of filing of a copy of a said published notice with the clerk of this court, which ever is later, within which to make written petition to this court (a) for the probate of the 1987 Will, (b) for the probate of any other will or (c) for a contest of the

validity of any will.

On January 5, 1990, Welch filed an exemplified copy of the 1987 will in Washington. On March 14, 1990, within 4 months of Judge Harris's order, Jack filed in Washington a "Petition for Admission of Will to Probate Pursuant to RCW 11.20.020" for the admission of the 1987 will to probate. Jack's petition did not, however, contest the 1984 will. A few days later, John and Tami filed a petition in Washington contesting the 1987 will and requesting that the court declare the 1987 will null and void.

A year passed with apparently no action on this case. Then, on March 26, 1991, John and Tami moved for summary judgment, arguing that the 1987 will was time-barred under RCW 11.28.340. Jack filed a cross-motion for summary judgment, arguing that Oregon — through the order admitting will to probate, which was not challenged by John and Tami — established the 1987 will as decedent's last will. He contended that the Oregon decision was binding on all parties to the Washington probate proceeding under the full faith and credit clause of the United States Constitution.

On July 30, 1992, Superior Court Judge Ted Kolbaba granted John and Tami's summary judgment motion. Jack then appealed to this court.

In reviewing a summary judgment, an appellate court engages in the same analysis as the trial court: a motion for summary judgment is properly granted if the moving party shows that

there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. The appellate court considers the facts in the light most favorable to the nonmoving party.[1]

I

Jack argues that Judge Kolbaba erred in granting John and Tami's summary judgment motion because the court was without authority to overrule a previous order admitting the 1987 will to probate. Jack contends that "[t]he summary judgment at issue in this appeal was entered thirty-one months after the order expressly permitting probate of the 1987 will" and that Judge Kolbaba lacked authority to review an order by Judge Harris and set the order aside. John and Tami respond that the 1987 will "has never been presented or admitted by the trial court for probate".

There is a conflict between the orders of Judges Harris and Kolbaba. To understand the conflict, a careful examination must be made of both the chronology of events and the applicable statutes.

First, in March 1988, a petition was filed to admit the 1984 will to probate in Washington, with notice being sent out to all interested parties. Jack apparently did nothing in response to this notice.

Second, on December 22, 1989, Judge Harris

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[1] *Bowles v. Department of Retirement Sys.*, 121 Wn.2d 52, 62, 847 P.2d 440 (1993); CR 56(c).

issued an order, reproduced in part above, which gave all parties 4 months to petition the court to probate the 1987 will or to contest any will within the 4-month period allowed under RCW 11.28.340. On March 20, 1990, within the 4-month period allowed by Judge Harris in his order, Jack petitioned Washington for probate of the 1987 will.

Third, in July 1992, Judge Kolbaba granted John and Tami's summary judgment motion, effectively overruling Judge Harris's December 1989 order. Judge Kolbaba ruled that Jack's petition to probate the 1987 will was untimely for two reasons. Judge Kolbaba found Jack's petition to probate the 1987 will was brought after the 4-month period prescribed by RCW 11.28.340 and thus he was barred from asserting that will. Judge Kolbaba's reasoning was based upon the fact that Washington probate began in March 1988, notice was sent to Jack, and Jack failed to do anything in response to the notice.

Alternatively, Judge Kolbaba also found that under the court's broad powers bestowed by RCW 11.96.020, Jack's petition was untimely because the petition "was brought outside the four [4] month period following notice of this probate proceeding and outside the four [4] month period after termination of the Oregon Probate proceeding". Thus, Judge Kolbaba ignored Judge Harris's order, went back to the beginning of the Washington proceeding and the end of the Oregon proceeding, and found Jack's petition to be untimely.

A

The first issue raised is whether Jack's petition for probate of the 1987 will was timely or whether it was time-barred by RCW 11.28.340. RCW 11.28.340 furnished the primary basis for Judge Kolbaba's decision. While RCW 11.24.010 authorizes any interested person to contest the probate or rejection of a will if the person petitions the court within 4 months following the order admitting a will to probate or rejection, RCW 11.28.340 authorizes any interested party to offer a later will for probate:

> Unless, within four months after the entry of the order adjudicating testacy or intestacy and heirship, and the mailing or service of the notice required in RCW 11.28.330 any heir, legatee or devisee of the decedent shall offer a later will for probate or contest an adjudication of testacy in the manner provided in this title for will contests, or offer a will of the decedent for probate following an adjudication of intestacy and heirship, or contesting the determination of heirship, an order adjudicating testacy or intestacy and heirship without appointing a personal representative to administer a decedent's estate shall, as to those persons by whom notice was waived or to whom said notice was mailed or on whom served, be deemed the equivalent of the entry of a final decree of distribution in accordance with the provisions of chapter 11.76 RCW for the purposes of:

> (1) Establishing the decedent's will as his last will and testament and persons entitled to receive his estate thereunder[.]

The "notice of adjudication of testacy" must include: (1) a statement that an order from a Washington superior court adjudicating that the decedent died testate was made, and (2) a copy of the will along with a statement that the adjudication of testacy will become final unless any heir, legatee or devisee contests the will within 4 months after the date the will was adjudicated to be the last will and testament of the deceased.[2]

Here, however, the trial court erred. RCW 11.28.340 gives any interested party 4 months to offer a later will for probate (1) "after the *entry of the order adjudicating testacy or intestacy and heirship,*" and (2) after notice containing the requirements of RCW 11.28.330 was sent to all heirs, legatees, or devisees. (Italics ours.) This statute does not bar the 1987 will because there was never an "Order Adjudicating Testacy or Intestacy and Heirship" entered, nor was there any notice meeting the requirements of RCW 11.28.330. Thus, it was impossible for the 4-month time period to have commenced. RCW 11.28.340 simply should have not played any part in the decision regarding the admission of the 1987 will.

In short, although Jack was time barred from contesting the 1984 will under RCW 11.24.010,

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[2]RCW 11.28.330.

he was not barred from admitting a later will under RCW 11.28.330. The offer to probate a later will does not constitute a contest of a prior will already admitted to probate.[3] Therefore, the statute did not bar Jack's petition for probate of the 1987 will and Judge Kolbaba erred in granting summary judgment on this basis.

B

There is a second reason why the court's order improperly denied Jack's petition. Judge Kolbaba's alternative basis for barring the petition for probate of the 1987 will was under RCW 11.96.020, which furnishes courts with very broad powers in probate proceedings. Judge Kolbaba concluded that Jack should be barred from petitioning the 1987 will (1) because Jack did not petition Washington to probate the 1987 will until more than a year after the termination of the Oregon probate in November 1988, and (2) because Jack knew the Washington probate began in March 1988 but did nothing until March 1990. In effect, Judge Kolbaba barred the 1987 will on a laches-like basis, deciding that Jack simply sat on his rights.

Several factors militate against this harsh remedy. First, the Supreme Court of Washington has held that a court of probate has inherent authority at any time, while an estate is still open, to admit to probate a later will than that being probated.[4] Second, determination of the

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[3] *In re Estate of Elliot,* 22 Wn.2d 334, 355-56, 156 P.2d 427, 157 A.L.R. 1335 (1945).

[4] *In re Estate of Campbell,* 46 Wn.2d 292, 295, 280 P.2d

decedent's wishes is the overriding factor in Washington probate proceedings. As our Supreme Court has stated:

> Courts go to the utmost possible length to carry into effect the testator's wishes, provided always that he has given them lawful expression. It is not only the testator's will which must be given effect, but it is his last will which must prevail. Where possible, the last will of a competent testator will be upheld, and courts will not, by technical rules of statutory or other legal construction, defeat the right of the testator to have effect given to the latest expression of his testamentary wishes....
>
> Neither should the will of a testator be defeated, as here, by the carelessness of the persons whose duty it was to present the [will] for probate. It is not their rights which are taken away, but the right of the testator to have his will carried out.[5]

Here, Judge Kolbaba's ruling denies the probate court any opportunity to hear the circumstances surrounding the execution of the 1987 will and thus determine exactly what Nicholas Stein intended.

Thus, the court erred because it had no authority to deny the admission of a later will,

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686 (1955).

[5]*Elliot,* 22 Wn.2d at 351 (quoting *In re Estate of Bronson,* 185 Wash. 536, 549-50, 55 P.2d 1075, 107 A.L.R. 238 (1936) (Beals, J., dissenting)).

apart from the application of RCW 11.28.330, which was not operative. The 1987 will was timely petitioned for admission to probate in Washington by Jack and was then timely contested by John and Tami.

II

Jack next argues (l) that Oregon probated the 1987 will and declared it to be decedent's last will and testament; (2) that Oregon properly had jurisdiction over this matter; and (3) that Washington must therefore give "full faith and credit" to Oregon's determination under article 4, section 1 of the United States Constitution.

Conversely, John and Tami argue Oregon "recognized that the Decedent had no real or personal property in the State of Oregon, had died being domiciled in the State of Washington and properly closed the probate proceeding then pending before it". They characterize the Oregon Order as an "order of dismissal" from which Jack failed to appeal. Moreover, they argue that even if the Oregon order was one finding the 1987 will to be the decedent's last will, Oregon lacked jurisdiction over the estate and Washington is therefore not bound by any order made by Oregon.

A judgment rendered by a court of one state, if valid, is entitled to recognition in the courts of another state by virtue of the full faith and credit clause.[6] Generally, this means a foreign judgment

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[6]U.S. Const. art. IV, § 1; *Effert v. Kalup,* 45 Wn. App. 12, 14, 723 P.2d 541 (1986); *see also* RCW 6.36, Uniform

must be given the same recognition and res judicata effect it would receive in the state which rendered it,[7] although a decree of a sister state may be subject to collateral attack for want of jurisdiction over the subject matter of the action or the parties to the action.[8]

However, a different set of principles is applicable where probate matters are concerned. Generally, primary probate of a will should be made in the place of the testator's domicile.[9] "The principle is fundamental that the law of the domicil governs the distribution of the assets of a decedent."[10]

The probate of a nonresident's will who dies leaving property within the state affects only the property within the jurisdiction and has no effect on the validity of the will itself beyond the limited purpose of the plenary power possessed by the state with respect to property within its domain; the requirement of full faith and credit to a sister state's judgment admitting a will to probate does not give such judgment extraterritorial effect on

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Enforcement of Foreign Judgments Act.

[7] *Idaho Dep't of Health & Welfare v. Holjeson,* 42 Wn. App. 69, 70, 708 P.2d 661 (1985), *reveiw denied,* 105 Wn.2d 1005 (1986).

[8] *Wampler v. Wampler,* 25 Wn.2d 258, 263, 170 P.2d 316 (1946).

[9] 95 C.J.S. *Wills* § 352(b) (1957); *Payne v. Payne,* 239 Ky. 99, 39 S.W.2d 205, 208 (1931).

[10] *In re Estate of Olson,* 194 Wash. 219, 227, 77 P.2d 781 (1938).

assets in other states.[11]

The courts of a decedent's domicile do not have jurisdiction to control devolution of real property held in another state; therefore, the state in which real property is located is not required to give full faith and credit to a decision of another state regarding probate of such real property.[12] When a testator executes a will devising lands in two or more states, the courts in each state will construe it as to the lands located therein as if devised by separate wills.[13]

A critical inquiry then is to determine what the Oregon court ordered. On November 30, 1988, Oregon approved the final accounting of the estate and ordered, in pertinent part, the following:

> IT APPEARING TO THE COURT, That at the time of his death said NICHOLAS A. STEIN was a resident and inhabitant of the State of Washington, as more particularly appears from the affidavit of Christopher D. Welch, on file herein; that as the estate of said decedent should properly be probated in the State of Washington rather than the State of Oregon, a final account was filed herein;...

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[11]95 C.J.S. *Wills* § 580 (1957); *Murphy v. Murphy,* 125 Fla. 855, 170 So. 856, 868 (1936); *Payne,* 39 S.W.2d at 207.

[12]*Clarke v. Clarke,* 178 U.S. 186, 195, 20 S.Ct. 873, 876, 44 L.Ed. 1028 (1900); *In re Estate of Hannan,* 246 Neb. 828, 523 N.W.2d 672, 674 (1994).

[13]*Trotter v. Van Pelt,* 144 Fla. 517, 198 So. 215, 217, 131 A.L.R. 1018 (1940).

> IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED, That the final account of the administrator C.T.A. of the within estate be and it is hereby settled, approved and allowed in all respects.
>
> IT IS FURTHER ORDERED, That said administrator C.T.A. be and he is hereby authorized and directed to pay himself the sum of $24,500.00 and to pay the final fees of the special attorney for the Administrator C.T.A. and the costs of closing said estate.
>
> IT IS FURTHER ORDERED, That the sole heir at law of said estate according to the laws of the State of Oregon is: JACK K. STEIN,...
>
> IT IS FURTHER ORDERED, That the sole devisees and legatees named in the Last Will and Testament of said deceased, according to the laws of the State of Oregon, are: [Jack; Tami; John; Thelma Lund; Jeffrey Cohen; and Clifford Freed.]...
>
> *IT IS FURTHER ORDERED, That the residue of said estate be paid and distributed to CHRISTOPHER D. WELCH, personal representative of the Estate of NICHOLAS A. STEIN, deceased, in the State of Washington, for final settlement and distribution as may be determined by the courts of that State.*

(Italics ours.)

The Oregon court thus found that the decedent was domiciled in the Washington. It also transferred all assets to the State of Washington

and did not distribute any assets, apart from fees. The general rules outlined above allow the Washington probate court to determine which will was the decedent's last will and testament as to those assets that were not in Oregon at the time of his death because Washington was the decedent's state of domicile. Thus, the Washington probate court is free to determine which will was the decedent's true will in regard to his assets in Washington at the time of his death, including his Washington real estate.

The Oregon order, which found the 1987 will to be decedent's true will, can apply only to the assets in Oregon at the time of his death because Oregon was not the state of domicile. The Oregon court's order has no force beyond Oregon's borders. Thus, Washington is not required to give full faith and credit to Oregon's order, except as to those assets which were in the State of Oregon at the time of the death of the decedent and were transferred to Washington for distribution.

From the record we cannot determine if all of the assets were in the State of Washington prior to the death of the decedent. Clearly, the probate court must hold an evidentiary hearing to determine if the decedent had any assets in Oregon at his death. If there were no assets in Oregon at the time of the decedent's death, then the Oregon order regarding the 1987 will is of no effect.

III

In conclusion, we reverse and remand to the probate court. Upon remand, the probate court must conduct a will contest to determine if the 1987 will was the last will and testament of Nicholas Stein. If the probate court determines that the 1987 will was not the true will, then the Washington estate will be distributed under the terms of the 1984 will. Conversely, if the probate court determines that the 1987 will was the true will, then the Washington estate will be distributed under the terms of the 1987 will.

The probate court must also determine whether any assets were in Oregon at the time of the decedent's death and thus whether the Oregon court had jurisdiction to conduct probate. If Nicholas Stein had assets within Oregon, then Oregon properly had jurisdiction and all Oregon assets, real or personal, will be distributed according to the terms of the 1987 will, which the Oregon probate court held to be the last will of the decedent. However, it must be stressed that the Oregon order will have no effect on the distribution of the Washington estate. Conversely, if the court finds the Oregon assets were transferred to Oregon only after the death of the decedent, then all assets will be distributed according to the outcome of the Washington will contest.

Reversed and remanded.
HOUGHTON, A.C.J. and FLEISHER, J. concur.
Reconsideration denied August 4, 1995.
Review denied at 128 Wn.2d 1014 (1996).

SUPERIOR COURT OF WASHINGTON
FOR CLARK COUNTY

In re the estate of	)	
	)	
NICHOLAS A. STEIN,	)	No. 88-4-00043-4
	)	
Deceased.	)	
	)	

ORDER GRANTING MOTION OF JOHN AND TAMI STEIN WITH RESPECT TO DISMISSAL OR IN THE ALTERNATIVE SUBSTITUTION OF REAL PARTY IN INTEREST PURSUANT TO CR 12(b)(6)
OCTOBER 3, 1997

This matter having come on regularly before the court upon the motion of John and Tami Stein and the following parties having appeared/been represented by counsel—Christopher Welch, Estate of Thelma Lund, John and Tami Stein, Jack Stein filed a written objection—and the court having considered the arguments made herein and the exhibits made of record herein and being therefore fully informed in the premises does hereby

ORDER, ADJUDGE AND DECREE

1. The interest of Jack Stein has been assigned, executed upon and reassigned. The Superior Court has held that the assignment by Stein to Norberg was a fraudulent conveyance intended to defraud the Estate of Thelma Lund.

Based upon the record before the Court it is apparent that Jack Stein lacks standing to pursue any claims in this matter. Jack Stein has no direct or indirect pecuniary interest in the Estate.

2. For the foregoing reasons Jack Stein is hereby dismissed, with prejudice. [sic] The Estate of Thelma Lund is substituted for Jack Stein in all respects herein and all further actions with respect to Jack Stein's interest in this Estate shall be pursued by the Representatives of the Estate of Thelma Lund.

DONE IN OPEN COURT this 3 day of October 1997.

/s/ ROBERT L. HARRIS
Judge

SUPERIOR COURT OF WASHINGTON
FOR CLARK COUNTY

In re the estate of	)	
	)	
NICHOLAS A. STEIN,	)	No. 88-4-00043-4
	)	
Deceased.	)	
	)	

AGREEMENT OF SETTLEMENT
FOR DISTRIBUTION
FEBRUARY 27, 1998

THIS AGREEMENT entered into by all parties of interest in the distribution of the above entitled estate is as follows:

1. Parties. The parties to this Agreement are: MARLENE WINCHESTER, Personal Representative of the estate of Thelma Lund, deceased, hereinafter referred to as "Lund Estate"; CHRISTOPHER WELCH, Personal Representative of the estate of Nick Stein, deceased, "Stein Estate"; JOHN STEIN, hereinafter referred to as "John"; TAMI STEIN, hereinafter referred to as "Tami"; WILLIAM D. ROBISON, successor Trustee of the John and Tammy Stein Trust, hereinafter referred to as "Robison"; and JOHN BARLOW, hereinafter referred to as "Barlow", as attorney for the Lund Estate in its capacity as successor to the interest of John (Jack) Stein by virtue of execution upon all his interest in the estate assets.

2. Resolution of Will Contest. The parties agree that the Last Will and Testament of Nick Stein executed in Washington on July 3,1984, is

the only valid Last Will and Testament of Nick Stein. The contest of said Will by Jack Stein in favor of a later "Oregon" Will shall be dismissed, and the parties agree such "Oregon" Will is fraudulent, invalid, void and of no effect.

3. John and Tami Stein reserve the right to seek attorney fees, costs and damages from Jack Stein. John and Tami Stein agree that they shall not pursue a claim for attorney fees, costs or damages of any kind from the Estate or from Jack Stein's share of the estate, provided that the net share of the estate allocable to Jack Stein is taken by his creditors and not by Jack Stein.

4. Agreement for Distribution. The parties hereto agree as follows:

[a] The above estate is ready to be closed.

[b] All assets of the above estate have been reduced to cash, or cash equivalents.

[c] All estate taxes and inheritance taxes have been paid.

[d] All costs of administration have been paid except those itemized on Exhibit "A" attached hereto.

[e] The Plan of Distribution, attached hereto as Exhibit "A", and disposition initialed by the parties hereto, is approved and adopted as the plan of distribution for the above estate.

5. Trust. The form off trust agreement establishing the John Stein and Tami Stein Trust, as attached hereto as Exhibit "B" [omitted], is approved, and and order directing the Personal

Representative of the above estate to enter into such agreement with William D. Robison as Trustee will be sought.

6. Final Report of Personal Representative. The Personal Representative will file his final report, setting forth an accounting of his administration of the estate, including an itemization and explanation of all sums received and all sums dispersed. An order will be entered setting a time for final hearing upon such report, with notices provided to the heirs, as well as published, as provided by statute. The Court will enter such orders as it deems appropriate following such hearing, after which final distribution will be made of the assets retained in the estate.

7. Stipulated Order. The parties stipulate and agree that the order, copy of which is attached hereto, may be entered by the Court approving the Plan of Distribution, authorizing an interim distribution of all assets in the estate except for Ex A-1 pg 2 paragraph iv and approving the form of trust for the John Stein and Tami Stein Trust.

/s/MARLENE WINCHESTER

/s/JOHN STEIN

/s/TAMI STEIN

/s/WILLIAM D. ROBISON

/s/JOHN BARLOW

EXHIBIT "A"
PLAN OF DISTRIBUTION

1. The assets of the estate consist of cash and cash equivalents more particularly described on Exhibit "A-1" attached hereto. Said sum is hereinafter referred to as the "Estate Assets".

2. The Estate Assets shall be distributed as follows:

[a] Toward payment of any sums owing to the Personal Representative of the Stein estate for fees and costs incurred herein.

[b] Payment of any sums owing to any creditor of the estate not previously provided for.

[c] The remaining sum ("Distributable Estate"), after payment of the items described above, shall be paid or distributed as follows:

[i] The sum of $[Exhibit A-1 pg 2 para 3] shall be retained by the Personal Representative pending hearing upon the Personal Representative's final report and an order entered approving said final report and providing for distribution of such sum.

[ii] The distributable shares of John Stein, Tami Stein and the Lund Estate as successor to Jack Stein shall be determined with consideration given to all advances, assignments, fees and costs paid to or on behalf of each of them and to or on behalf of Jack Stein, consistent with the principle that one-third (1/3) of the distributable estate shall be paid to Marlene Winchester, Personal Representative of the estate of Thelma Lund, and

two-thirds (2/3) of the distributable estate shall be paid to William D. Robison as Trustee for John Stein and Tami Stein Trust. The parties agree that the correct treatment of advances, assignments, fees and costs chargeable with respect to Jack Steion [sic] is set forth in the "Lund Estate's Response (and Objections) to certain Claimed Offsets" dated January 21, 1998 with the exception of the $5,000.00 paid the Gerald Wear [sic] pursuant to the Court's Order of May 1, 1992 which shall be treated as an estate administration expense.

[iii] After providing for the sums reserved as provided in subparagraph [i], the distributable share allocable to John Stein and Tami Stein, less advances and sums paid to said parties, shall be paid and distributed to William D. Robison as Trustee for John Stein and Tami Stein Trust. The portion of the distributable estate allocated to Marlene Winchester, Personal Representative of the estate of Thelma Lund, shall be paid to Walstead Mersching Trust Account, less advances and sums paid to Jack Stein, his creditors and/or assigns.

[iv] Upon final closure of the estate, the remaining balance of the funds held pursuant to paragraph [c][i] shall be paid one-third (1/3) to Narlene Winchester as Personal Representative of the Estate of Thelma Lund and two-thirds (2/3) to William D. Robison as trustee of the John and Tami Stein Trust.

SUPERIOR COURT OF WASHINGTON
FOR CLARK COUNTY

In re the estate of	)	
	)	
NICHOLAS A. STEIN,	)	No. 88-4-00043-4
	)	
Deceased.	)	
	)	

ORDER DIRECTING PARTIAL AND
PRELIMINARY DISTRIBUTION
FEBRUARY 27, 1998

This matter coming before the court on the Petition of the personal representative of the above estate for an Order directing preliminary and partial distribution of the assets of the above estate, it appearing to the court that notice of the hearing in the form and manner required by statute has been given, the court having reviewed the Petition, having heard oral argument and otherwise being fully advised,

Now, therefore,

IT IS ORDERED that the personal representative is directed to make immediate and partial distribution of the cash assets of the estate as follows:

1. $543,070.77 to the Estate of Thelma Lund.

2. $1,626,771.10 to the Nicholas A. Stein Testamentary Trust.

DATED this 27 day of February 1998.

/s/ ROBERT L. HARRIS
Judge

WASHINGTON SUPREME COURT

In re the Estate of	)	
	)	
NICHOLAS A. STEIN,	)	No. 67444-2
	)	
Deceased.	)	
_____	)	

MOTION TO MODIFY COMMISSIONER'S RULING DENYING DISCRETIONARY REVIEW
MARCH 3, 1999

1. IDENTITY OF MOVING PARTY

[1] Jack K. Stein, petitioner, asks the relief designated in Part 2.

2. STATEMENT OF RELIEF SOUGHT

Petitioner asks this Court to modify the Ruling Denying Review entered by the Court Commissioner on February 2, 1999. The ruling denied discretionary review of a decision by the Court of Appeals, Division II, which in turn denied a motion for discretionary review of a Clark County Superior Court Order dated October 3, 1997 which dismissed Jack Stein from any further participation in the judicial proceeding concerning his father's estate. This Court should grant review, reverse the Clark County Superior Court, and order that the will contest originally ordered in *In re Estate of Stein*, 78 Wn. App. 251, 264, 896 P.2d 740 (1995) take place.

3. FACTS RELEVANT TO MOTION

*...[3]...Finally, an extremely recent event has changed much of the complexion of this case. On Friday, February 26, 1999, Division II in cause no. 20813-0-II (Mr. Stein's direct criminal appeal), reversed his conviction and remanded for a new trial in a partially published, partially non-published opinion.

4. GROUNDS FOR RELIEF AND ARGUMENT

*...This Court should accept review and reverse the Clark County Superior Court in order to enable Mr. Stein to preserve what little remains of his father's Estate. The reversal of Mr. Stein's criminal conviction, *see* part 3 above, should raise serious constitutional due process questions regarding the validity of the matter of *Winchester v. Stein,* 135 Wn.2d 835, 959 P.2d 1077 (1998). This is so because, over Mr. Stein's objection, the wrongful death action on behalf of Thelma Lund was consolidated with the State's RICO action against Stein, and the largest portion of that verdict was awarded to the State. In that trial proceeding, Stein was estopped from denying that he had participated in an attempt on the life of Ned Hall because of the criminal conviction. It would certainly appear that the estoppel theory would no longer be valid and Stein would have a basis to reopen the matter of *Winchester v. Stein* under Civil Rule 60(b)(11)....*

RESPECTFULLY SUBMITTED at Walla Walla, Washington this 3rd day of March, 1999.

/s/ William D. McCool, Counsel for Petitioner

SUPERIOR COURT OF WASHINGTON
FOR CLARK COUNTY

In re the estate of	)	
	)	
NICHOLAS A. STEIN,	)	No. 88-4-00043-4
	)	
Deceased.	)	
	)	

JACK STEIN'S MOTION FOR
ABATEMENT OF DISTRIBUTION
TO TESTAMENTARY TRUST
MAY 3, 1999

Without waiving his demand that this entire estate be administered according to his father's 1987 will, Jack Stein requests, in the alternative, that the residuary legacy to the trust for John Stein and Tami Stein, created in the 1984 will, be abated so that he might have the benefit of his rightful share of property sited in Oregon that would have passed to him under the 1987 will had it not been consumed during administration of the estate....*

RESPECTFULLY SUBMITTED this 3rd day of May 1999.

/s/ THOMAS CLINE
Attorney for Jack Stein

SUPERIOR COURT OF WASHINGTON
FOR CLARK COUNTY

In re the estate of	)	
	)	
NICHOLAS A. STEIN,	)	No. 88-4-00043-4
	)	
Deceased.	)	
	)	

JACK STEIN'S MOTION TO REVISE
ORDER DEPRIVING HIM OF STANDING
MAY 27, 1999

Jack Stein respectfully requests that the *Order Granting Motion of John and Tami Stein with Respect to Dismissal or in the Alternative Substitution of Real Party in Interest Pursuant to CR 12(b)(6)* entered herein on the 3rd day of October 1997 be revised....*

The subject of this motion is a previous order which deprived Jack Stein of standing in these probate proceedings.

The order was entered at the request of William D. Robison, who had been appointed testamentary trustee, under the terms of the 1984 will, for the benefit of John Stein and Tami Stein.

Mr. Robison successfully argued that the Estate of Thelma Lund should be substituted in Jack Stein's stead as real party in interest because of a purchase made by the Lund Estate at a 1992 sheriff's sale conducted in execution of a judgment entered in that certain civil action known as *Winchester v. Stein*, Clark County No. 88-2-03442-1, which resulted in a 1994 *Sheriff's*

Deed on Execution and Order of Sale.

The judge who had presided over the *Winchester v. Stein* case has recently entered an order (1) vacating the judgment against Jack Stein *ab initio*, (2) declaring the aforementioned sheriff's sale and deed null and void, (3) vacating any and all orders confirming the sheriff's sale and deed, and (4) dismissing with prejudice the Lund Estate's claim against Jack Stein....*

All acts undertaken in these probate proceedings by any party in reliance upon the aforementioned sheriff's sale are void. Jack Stein has regained his standing and has filed, contemporaneously with this motion, a number of documents to protect, preserve, and defend his rights with respect to his father's estate.

RESPECTFULLY SUBMITTED this 27th day of May 1999.

/s/ THOMAS CLINE
Attorney for Jack Stein

SUPERIOR COURT OF WASHINGTON
FOR CLARK COUNTY

In re the estate of	)	
	)	
NICHOLAS A. STEIN,	)	No. 88-4-00043-4
	)	
Deceased.	)	
	)	

JACK STEIN'S MOTION TO REVISE
ORDER TERMINATING WILL CONTEST
JUNE 22, 1999

Jack Stein hereby moves, without waiving or withdrawing any of his other pending motions, that the order entered on the 5th day of March 1998 approving the *Agreement of Settlement for Distribution* be revised, pursuant to CR 54(b), to the effect that it will not yet finally have been determined which of the two wills is operative and that a will contest shall be convened to determine the issue....*

RESPECTFULLY SUBMITTED this 22nd day of June 1999.

/s/ THOMAS CLINE
Attorney for Jack Stein

SUPERIOR COURT OF WASHINGTON
FOR CLARK COUNTY

In re the estate of	)	
	)	
NICHOLAS A. STEIN,	)	No. 88-4-00043-4
	)	
Deceased.	)	
	)	

ORDER APPROVING FINAL REPORT AND
DECREE OF FINAL DISTRIBUTION
JUNE 30, 1999

This matter came before the Court on May 6, 1999 on the Final Report and Petition for Decree of Final Distribution (the "Final Report") of Christopher D. Welch, the personal representative. Neil T. Jorgenson appeared on behalf of the personal representative. Thomas Cline appeared on behalf of Jack Stein. Norman Dick appeared on behalf of Marlene Winchester, personal representative of the Thelma Lund Estate. The Court considered motions and supporting materials filed by Jack Stein in anticipation of the hearing. The Court considered the motion of John and Tami Stein filed in anticipation of the hearing. The Court took all those motions under advisement, requested further briefing by some of the parties and reset this matter to June 30, 1999. At that hearing, the Court heard oral argument from the parties. Based upon the foregoing, the Court finds as follows:

(a) Nicholas Stein died on August 23, 1987 in Clark County, Washington. (Petition for Probate of Will, Clark County Superior Court Appearance Docket, Subject No. 2.)

(b) Nicholas Stein was a Washington domiciliary at the time of his death. (Washington Court of Appeals opinion in Case 16381-1-II of June 22, 1995.)

(c) At his death, the decedent was the subject of a guardianship of his estate and of his person. That guardianship was pending in Clark County Superior Court, Case No. 82 4 000212 8.

(d) On August 28, 1987, Jack Stein petitioned for probate of Nicholas Stein's estate in Oregon Circuit Court for Multnomah County. Jack Stein sought appointment as personal representative, and was so appointed by the Oregon Circuit Court (Washington Court of Appeals opinion in Case 16381-1-II of June 22, 1995).

(e) On March 7, 1988, this case was commenced (Petition for Probate of Will, Subject No.2).

(f) Jack Stein contested the validity of the decedent's Will admitted to probate in this case (Motion to Revoke and Annul Will and Probate, Subject No. 275).

(g) The Lund Estate sued Jack Stein for the wrongful death of Thelma Lund. The Lund Estate won a money judgment against Jack Stein. The Lund Estate executed on its judgment against Jack Stein's distributive share of this Estate

(Motion for Order Substituting Real Party in Interest, Subject No. 1396).

(h) After execution, this Court determined that Jack Stein had no standing to contest the decedent's Will or to participate further in this Estate. The Court did so in an order dated October 3, 1997 (Subject No. 1402).

(i) The Washington Court of Appeals refused to review the foregoing decision of the trial court (Subject Nos. 1466 and 1467).

(j) The Washington Supreme Court upheld the Court of Appeals decision in an opinion dated June 4, 1999.

(k) Tami Stein and John Stein, the decedent's grandchildren and legatees under the decedent's Will, settled the Will dispute with the Lund Estate. Tami and John moved for Court approval of their Agreement for Settlement for Distribution dated February 27, 1998 (the "Settlement Agreement"). The Court approved that Settlement Agreement by order dated March 5, 1998 (Subject No. 1437).

(l) By the terms of the Settlement Agreement,

(i) The decedent's Will of July 3, 1984 was determined to be the only valid Last Will and Testament of Nicholas Stein; and

(ii) The Will of 1987 was declared fraudulent, invalid, void and of no effect; and

(iii) Jack Stein's Will contest was to be dismissed; and

(iv) John and Tami waived their rights to pursue attorney fees, costs or damages from Jack Stein's distributive share of this Estate to the extent that such distributive share was to go to the Lund Estate. Tami and John reserved rights of recovery on account of Jack Stein's repeated interference with the orderly administration of this Estate to the extent of any distribution to Jack Stein.

(m) The parties agreed to a plan of distribution of the Estate consistent with the 1984 Will. The Settlement Agreement incorporated, by reference, a Petition for Partial and Preliminary Distribution filed with the Court by the personal representative (Subject No. 1436).

(n) By order of the Court dated March 5, 1998, the Court,

(i) approved the settlement; and

(ii) authorized distribution pursuant to the Petition and the Settlement Agreement (Subject No. 1437).

(o) The Lund Estate and Jack Stein entered into an agreement settling the wrongful death suit and judgment against Jack Stein. Jack Stein and the Lund Estate did so after Court approval of the settlement between the Lund Estate and John and Tami Stein (Declaration of Thomas Cline on Restoration, Subject No. 1484).

(p) Immediately thereafter, Jack Stein moved to vacate the order depriving him of standing (Motion of Jack Stein to Vacate Order, Subject No. 1483). The Court denied that motion.

(q) A decedent's intangible personal property is sited in the jurisdiction of the decedent's domicile.

(r) Certificates representing ownership of investment securities are sited in the owner's domicile.

(s) Among the assets of Nicholas' guardianship were certain investment securities. At Nicholas' death, certificates representing those securities were in the custody of the U.S. National Bank of Oregon in a branch in Portland, Oregon (Affidavit of Jack Stein Regarding Property in Oregon, Subject No. 1487).

(t) Jack received physical custody of those certificates from the U.S. National Bank at a location in Portland, Oregon, after Nicholas' death (Affidavit of Jack Stein Regarding Property in Oregon, Subject No. 1487).

(u) Neither Nicholas Stein's investment securities, nor any of his other property, was located in Oregon at his death.

(v) Because Nicholas Stein was a Washington domiciliary at his death, and because Nicholas Stein had no assets in Oregon at his death, the Oregon Circuit Court had no jurisdiction to conduct a probate administration of his estate.

(w) All of the decedent's property is subject to distribution under the terms of the Will admitted to probate in this case.

(x) All of the decedent's property remaining

in the hands of the personal representative is to be distributed in accordance with the terms of the Settlement Agreement.

(y) This estate is ready for final settlement and distribution. This estate has been in probate administration for nearly 12 years. Jack Stein's activities have greatly increased the expense of administering the estate. To minimize future expenses and to avoid delay, this order should be final.

IT IS ORDERED as follows:

1. All acts of the personal representative in administering the estate as set forth in the Final Report are approved;

2. All liability for the decedent's last illness, funeral and burial expenses, state and federal estate taxes, and all tax returns required of this estate or on account of this decedent have been filed, and all other costs, expenses and fees incurred or to be incurred in the administration of the decedent's estate have been fully paid or satisfied excepting expenses incidental to the hearing on the Final Report and the distribution of property;

3. The personal representative is directed to pay his attorney, Neil T. Jorgenson, the sum of $27,616.07 as fees for services rendered and costs advanced in the administration of this estate from September 1, 1997 through December 31, 1998;

4. The personal representative is allowed $670.65 in payment for fees and costs rendered on behalf of the estate from November 16, 1997

through November 30, 1998. The personal representative shall be paid the foregoing sum from estate cash;

5. The distributees are as follows:

John Stein and Tami Stein Trust two-thirds

Estate of Thelma Lund one-third

6. Interim distributions have been made by the personal representative in accordance with Exhibit C of the Final Report;

7. Property of the decedent's estate remaining in the hands of the personal representative is as set forth in Exhibit E of the Final Report;

8. All property remaining in the hands of the personal representative, after payment of all fees and expenses, shall be distributed as set forth in paragraph 8 of the Final Report; and

9. Upon filing Receipts signed by each of the heirs and distributees, an Order shall be entered discharging the personal representative, exonerating his bond and declaring the estate closed.

10. This is a final judgment and decree.

Dated: June 30, 1999

/s/ ROBERT L. HARRIS
Superior Court Judge

WASHINGTON COURT OF APPEALS
DIVISION TWO

In re the Estate of	)	
	)	
NICHOLAS A. STEIN,	)	No. 24899-9-II
	)	
Deceased.	)	
_____	)	

EXCERPTS FROM BRIEF OF APPELLANT
DECEMBER 20, 1999

[20]...The Lund Estate's recent settlement of its claim against Jack Stein completely settles the question as to the invalidity of the substitution of parties.

The Lund Estate acquired its sheriff's deed at a sale in execution of a wrongful death judgment. At the time of the trial, Jack Stein stood convicted of three counts of attempted murder and one count of burglary. These convictions were shown to the jury, who proceeded to award the Lund Estate its four-million dollar verdict. *See Winchester v. Stein,* 86 Wn. App. 458, 462, 937 P.2d 618 [21] (1997) ("Stein contends that...the trial court erred...in consolidating the criminal profiteering and civil actions"), *aff'd in part, rev'd in part,* 135 Wn.2d 835, 959 P.2d 1077 (1998).

In February of 1999, this Court reversed Jack Stein's convictions. *State v. Stein,* 94 Wn. App. 616, 972 P.2d 505 (1999). To avoid a new trial and restitution of its judgment proceeds, the

Lund Estate agreed to vacate its judgment *ab initio* and nullify the sheriff's deed. The trial judge signed the stipulated order. (CP 513-514)

After this settlement, Jack Stein filed a motion with the probate court to revise the order that deprived him of standing (CP 547-549); and he filed a motion to revise the order that settled the will contest. (CP 574-575) He also noted the will contest for trial. (CP 542)

His motions were proper because a Superior Court retains "plenary authority," until final judgment, to revise its interlocutory orders, *Washburn v. Beatt Equipment Co.*, 120 Wn.2d 246, 301, 840 P.2d 860 (1992) (citing with approval 11 C. Wright & A. Miller, *Federal Practice* § 2852, at 145 & nn. 27-28 (1973)); CR 54(b), particularly if there have been changes in the rights and duties of the parties which render an interlocutory order unfair, inappropriate, or obsolete.

Although the Superior Court restored Jack Stein [22] to standing, it refused, at the request of the testamentary trust, to reinstate the will contest.

This was error....*

[24] Although this Court should allow Jack Stein his day in court and an opportunity to prove the 1987 will, it should also direct the testamentary trust to immediately restore to him the sum of $247,221.59. Jack Stein should be given this sum, without further delay, because it is the minimum amount to which he is entitled, no matter what the outcome of the will contest.

Redistribution is necessary in order to give full faith and credit to the Oregon decree of distribution and account for property located in Oregon on the date of Nicholas Stein's death....*

The Superior Court was obligated, by the law of the case doctrine, *Lutheran Day Care v. Snohomish County*, 119 Wn.2d 91, 113, 829 P.2d 746 (1992), to enforce the determination of this Court, in the interlocutory appeal, that "all Oregon assets, real or personal, ...be distributed according to the terms of the 1987 will." (CP 362)

Although your appellant conclusively proved that investment certificates belonging to this estate were inside [25] an Oregon bank on the date of Nicholas Stein's death, the Superior Court decided to distribute the estate entirely on the basis of the 1984 will.

This was error. Full faith and credit can be given the Oregon decree only if there is a proportionate recalculation of the distributive shares.

/s/ THOMAS CLINE
Attorney for Appellant

WASHINGTON COURT OF APPEALS
DIVISION TWO

In re the Estate of	)	
	)	
NICHOLAS A. STEIN,	)	No. 24899-9-II
	)	
Deceased.	)	
_____	)	

EXCERPTS FROM BRIEF OF RESPONDENTS
MARCH 14, 2000

[41] Jack reached a settlement with the Lund Estate after the Court of Appeals reversed his conviction. The Lund Estate gave up nothing. It was allowed to retain what it had received and to obtain what it would receive from the settlement agreement. In return, the Lund Estate entered into a stipulation to vacate its judgment against him *"ab initio"* and to void the sheriff's deed. John and Tami, the Trustee of the Stein Testamentary Trust, and the Personal Representative were not parties to this agreement.

Jack has obviously recognized that the judgment the Lund Estate obtained cost him his share of his father's estate. He wishes to re-write history to eliminate the effect of the judgment the Lund Estate obtained. This gambit will not be successful.

First of all, the vacation order that Jack obtained does not grant him the relief that he [42] seeks. Judge H. John Hall, who signed the order, interlineated language subjecting the validity of the sheriff's sale to further court review. No review

has taken place so as to nullify the sheriff's deed. Thus, the vacation order afforded Jack no relief as it concerns the real property.

More importantly, the settlement that Jack made with the Lund Estate cannot be used to improve Jack's position against John and Tami and the Trustee of the Testamentary Trust that Nicholas Stein established. The courts of our state do not look favorably upon agreements or settlements designed to enhance one of the settling party's rights against third persons....*

[45]...In summary, Jack and the Lund Estate could settle between them as they desired. Their settlement could not affect the rights of anyone else, however. Jack can therefore not use this settlement to gain any rights against John and Tami.

Jack's settlement with the Lund Estate should be viewed as the Lund Estate assigning back to Jack its rights in the Estate of Nicholas Stein. The Lund Estate could assign Jack only what it had at the time it made the assignment. [Citations omitted.] This means that Jack takes the Lund Estate's rights under the settlement agreement it entered into with John and Tami. The agreement eliminated any claim that the 1987 will was valid and allowed for the distribution of certain monies. Jack succeeds to those rights but is powerless to make any claims inconsistent with the settlement agreement....*

/s/ BEN SHAFTON
Attorney for Respondents

WASHINGTON COURT OF APPEALS
DIVISION TWO

In re the Estate of	)	
	)	
NICHOLAS A. STEIN,	)	No. 24899-9-II
	)	
Deceased.	)	
	)	

EXCERPTS FROM REPLY BRIEF
JULY 20, 2000

[6]...Although the Lund Estate agreed to vacate its own judgment, it did not collude with appellant for any improper purpose. The reversal of the convictions presented your appellant with *bona fide* grounds for relief under CR 60(b)(6) and (11). *See also* Restatement (Second) of Judgments § 73 (1982). These two litigants should not be precluded from [7] settling the matter when they have carefully weighed their interests, undertaken extensive negotiations, and arrived at a fair settlement. At one time, at least, the grandchildren had a right to intervene in the wrongful-death case to protect any interest they might have had. *See, e.g., Marriage of Himes,* 136 Wn.2d 707, 732-735, 965 P.2d 1087 (1998). They may also protect themselves by seeking compensation from the Lund Estate for breach of warranty.

The case *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership,* 513 U.S. 18, 115 S.Ct. 386, 130 L.Ed.2d 233 (1994), is controlling authority in the federal courts. The issue in that case was whether the judgment of the Court of Appeals should be

vacated after a settlement rendered the case moot. Distinguishing *United States v. Munsingwear, Inc.*, 340 U.S. 36, 71 S.Ct. 104, 95 L.Ed. 36 (1950), the Supreme Court refused to grant the relief. Vacatur was denied because the moving party, by its voluntary action, caused the very event for which it sought the relief. In *Munsingwear,* the triggering event was outside the control of the moving party. The governing principle is stated in *U.S. Bancorp,* 513 U.S. at 24-25 (Scalia, J.): [8]

> The principal condition to which we have looked is whether the party seeking relief from the judgment below caused the mootness by voluntary action.... A party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstances, ought not in fairness be forced to acquiesce in the judgment.

Under the principle announced in *U.S. Bancorp,* the wrongful-death judgment has been validly vacated. Your appellant vigorously and exhaustively pursued his appeal of that judgment. However, because of manifest constitutional error, there was a ten-year delay in the review of his felony convictions. When, eventually, those convictions were reversed, appellant promptly sought relief. The event that triggered his right under CR 60—the reversal of his felony convictions—was completely outside his volition.

/s/ THOMAS CLINE
Attorney for Appellant

WASHINGTON COURT OF APPEALS
DIVISION TWO

In re the Estate of	)	
	)	
NICHOLAS A. STEIN,	)	No. 24899-9-II
	)	
Deceased.	)	
_____	)	

EXCERPTS FROM APPELLANT'S MOTION
TO RECONSIDER UNPUBLISHED OPINION
MARCH 7, 2001

RELIEF REQUESTED

[1] Appellant requests that this court reconsider its unpublished opinion of February 15, 2001 and reverse the Superior Court decisions to which he has assigned error.

Appellant requests, in the alternative, that this court revise its opinion to make a complete disposition of the arguments presented to this court for its consideration.

ARGUMENT

Thirty-five days after the oral argument, this court issued a seven-page opinion that concluded its review of a fourteen-year probate case, a case involving substantial public interest, complex legal issues, large sums of money, and a party who has spent the past twelve years in prison as a result of a process that—in the opinion of this court and the federal district court—has been plagued with constitutional errors at the trial and appellate levels.

Jack Stein disagrees, of course, with the court's opinion; but he is more concerned with what the opinion has left unsaid. The opinion upheld the settlement agreement [2] reached by Jack Stein's adversaries in the Superior Court but did not dispose of each alternative argument as to why that agreement is void. Your appellant has argued, of course, that the agreement is void because he retained an interest in his father's estate which escaped execution and sale and remained, therefore, a necessary party to any settlement. But he also argues there has been a failure of the Lund Estate's apparent interest in this estate insofar as its judgment has been infected with the same constitutional errors which led to a reversal of his felony convictions. These matters have been fully briefed. It is fair neither to Jack Stein nor to the appellate process to enter a decision without fully addressing these alternative arguments....*

[6] To be utterly forthright, this court should explain why the very same constitutional error which has led to a reversal of Jack Stein's criminal convictions should not also lead, via the Rule 60 order, to a complete extinguishment of the wrongful-death judgment and the judicial sale of Jack Stein's interest in his father's estate. This issue was fully and fairly brought not simply to the attention of the Superior Court but also to the attention of this court....*

/s/ THOMAS CLINE
Attorney for Appellant

WASHINGTON COURT OF APPEALS
DIVISION TWO

In re the Estate of	)	
	)	
NICHOLAS A. STEIN,	)	No. 24899-9-II
	)	
Deceased.	)	
	)	

ORDER ON RECONSIDERATION
AND WITHDRAWING OPINION
JULY 27, 2001

The appellant has moved for reconsideration of the court's unpublished opinion filed February 15, 2001. In his motion for reconsideration, appellant repeatedly asserts that "[t]his issue was fully and fairly brought not simply to the attention of the Superior Court but also to the attention of this court," and "[t]he abatement claim was fully and fairly argued, both in the Superior Court and this court," and "[t]he Rule 60 motion was presented to the court on a veritable silver platter." These bald assertions, however, are unsupported by citations to the record in the superior or appellate courts. The issue is not whether Stein objected to the trial court's actions below, but whether he did so on the same grounds asserted on appeal. Appellant's Motion to Reconsider does not establish that he did.

The unpublished opinion in this case was filed on February 15, 2001. Upon reconsideration, the court has decided to withdraw the opinion filed on February 15,2001. It is, therefore,

ORDERED:

The unpublished opinion filed in this case on February 15, 2001, is hereby withdrawn. The court's new opinion is attached to this order.

DATED this 27th day of July, 2001.

/s/ QUINN-BRINTNALL, J.

We concur:

/s/ SEINFELD, P.J.

/s/ HOUGHTON, J.

WASHINGTON COURT OF APPEALS
DIVISION TWO

In re the Estate of	)	
	)	
NICHOLAS A. STEIN,	)	No. 24899-9-II
	)	
Deceased.	)	
	)	

AMENDED UNPUBLISHED OPINION
JULY 27, 2001

QUINN-BRINTNALL, J. — Jack Stein appeals from an order approving the final distribution of his father's estate. He argues that his judgment creditor from a wrongful death suit was improperly substituted for him as a real party of interest in the administration of his father's estate after the creditor caused a sheriff's sale of part but not all of Stein's interest in Clark County real estate held by his father's estate. Because Stein raises this argument for the first time on appeal, we decline to address it and affirm.

I. FACTS

The protracted 12-year administration of Jack Stein's father's multi-million dollar estate (Stein Estate) began in 1987 when Nicholas Stein died. By July 1991, the Stein Estate was worth over $3.5 million, mostly in the form of two unliquidated parcels of real estate in Clark County, Washington (parcels 1 and 2). The administration was protracted in part by litigation

between beneficiaries over the validity and effcct of competing Washington and Oregon wills. *See In re Estate of Stein,* 78 Wn. App. 251, 253,896 P.2d 740 (1995), *review denied,* 128 Wn.2d 1014 (1996). Jack Stein was a named beneficiary in both wills and a proponent of the Oregon will, which gave him virtually all of the Stein Estate. John and Tami Stein were the proponents of the Washington will, which gave them approximately two-thirds of the Stein Estate.

A. WRIT OF EXECUTION

The murder of Thelma Lund[1] first protracted the administration and then led to the settlement of the will contest. In 1991, a jury found Jack Stein liable for the wrongful death of Lund, who had been severely beaten and strangled, and awarded her estate $4,000,000. The trial court trebled the damages to $12,000,000. *Winchester v. Stein,* 135 Wn.2d 835, 840, 842, 959 P .2d 1077 (1998). In 1992 the Lund Estate took steps to execute upon its judgment in the wrongful death case. Marlene Winchester, the personal representative of the Lund Estate, obtained a writ of execution authorizing the county sheriff to levy upon and sell all of Jack Stein's non-exempt personal and real property in Clark County to satisfy the judgment and judgment interest. The sheriff levied upon and sold Jack Stein's

---

[1]Lund was a named beneficiary in the Washington, but not the Oregon, will. Lund's relationship to the decedent Nicholas Stein and her status as a beneficiary are interesting but ultimately irrelevant facts in this appeal. She died before Nicholas Stein's death, therefore her gift lapsed under the Washington will.

"undivided one-third interest (or whatever other interest the Court finds he has)" in parcel 1 of the Stein Estate's Clark County real estate to Winchester as personal representative of the Lund Estate. Clerk's Papers at 376. The sheriffs sale did not involve, parcel 2. This was an apparent oversight and was never brought to the attention of the probate court.

By July 1992, with the exception of the contents of a safe deposit box valued at less than $2,000, the Stein Estate held as assets Clark County real estate and less than $1,000 in checking and money market accounts. The Stein Estate sold the Clark County real estate by the end of 1995.

B. SUBSTITUTION OF LUND ESTATE FOR JACK STEIN

In September 1997, Tami and John Stein moved to substitute the Lund Estate for Jack Stein as the real party of interest in the will contest. They presented two bases for the substitution: one, Jack Stein lacked standing because he had fraudulently assigned to his wife, Bethany Norberg, all of his interest in his father's estate;[2] and two, the Lund Estate had executed on

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[2]On December 20, 1988, Jack Stein was served with a Summons and Complaint alleging that he caused the wrongful death of Lund. On the same day he executed assignments of his interest in his father's estate in favor of Norberg. He continued, however, to take the position that he had an interest in his father's estate. The probate court found that Jack Stein had assigned his interest for the purpose of hindering, delaying, and/or defrauding the Lund Estate, and declared the assignments null and void.

all of Jack Stein's interest in his father's estate. Jack Stein objected pro se to his removal as a real party of interest on four bases:

1. Stein's assignments related only to funds and not real property;

2. Stein and Norberg recanted the assignment;

3. The Lund Estate executed against only real property and not all of Jack Stein's interest in the Stein Estate; and

4. Jack Stein expected to eventually inherit "far more from his father's estate than the [Lund Estate] judgment."

Clerk's Papers at 437-38 (Stein Objection at 2). Stein provided the court no legal authority or details in support of his objections.

On October 3, 1997, after finding that Stein lacked standing and had no direct or indirect pecuniary interest in the Stein Estate, the probate court dismissed him from the probate with prejudice, and substituted the Lund Estate for him "in all respects."

C. SETTLEMENT AGREEMENT

On February 27, 1998, the Lund Estate personal representative Winchester, John and Tami Stein, the Stein Estate personal representative Christopher Welch, the trustee of the John and Tami Stein Trust, and the attorney for the Lund Estate in its capacity as successor to the interest of Jack Stein entered into an agreement that settled the will contest and

resolved the distribution of the Stein Estate's remaining assets. The parties agreed that the Washington will was the only valid last will of Nicholas Stein. On March 5, 1998, the probate court approved the settlement agreement.

Over a year later, between May 3, 1999, and June 28, 1999, Jack Stein made several motions to the probate court. First, Stein moved to have his standing in the probate case restored. He argued that his interest in the Stein Estate was restored because the superior court in the wrongful death action had: (1) vacated *ab initio* the wrongful death judgment; (2) declared the sheriffs sale to the Lund Estate of "any interest [he] might have had with respect to [Clark County] real property owned by this estate" and subsequent deed null and void; and (3) dismissed with prejudice the Lund Estate's claims against Jack Stein. Clerk's Papers at 511-14.[3] In his remaining motions, he asked the probate court to abate distributions to the John and Tami Stein Testamentary Trust, determine the situs of investment securities at the time of his father's death, distribute Oregon property according to the terms of the Oregon will, and revise the March 1998 order that approved the settlement agreement.

On June 30, 1999, the probate court restored Jack Stein's standing for the purpose of being heard; thereafter, the court denied Jack Stein's

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[3]The trial court specifically noted that the status of the sale and deed were "subject to further court review." Clerk's Papers at 513-14.

remaining motions and entered a final order approving the administrator's final report and recommended final distribution, consistent with the settlement agreement. Jack Stein appeals.

II. ANALYSIS

A. RAP 2.5(a)

Jack Stein contends that, because he retained a pecuniary interest in his father's estate when the probate court removed him, any settlement agreement between the remaining parties was void. He argues that the sheriff's sale involved only about half of the Clark County real estate held by his father's estate and that the personal administrator "disseized" the Lund Estate of even its partial interest when the Stein Estate sold the Clark County real estate to third parties. The respondents correctly point out that, for the first time on appeal, Jack Stein argues that the sheriff's sale did not dispose of all the potential interest he might have had in the Clark County real estate and that disseisin restored to him a possessory interest he may have once lost.

Jack Stein's position on appeal is different from the position he took during the action below. As late as June 1999, Stein characterized the 1992 action by the sheriff as a sale of "any interest [he] might have had with respect to [Clark County] real property." Thus, the probate court reasonably believed that (a) Stein had no interest in the Clark County real estate, and (b) the Stein Estate would hold no other assets after estate administrative taxes and expenses had been paid. Now Stein claims that the sheriff sold only part of

the interest he might have had in the real estate. Regardless of the merits of Stein's claim on appeal, the probate court never had an opportunity to address the issues that Stein is now raising.

The Rules of Appellate Procedure permit an appellate court to refuse to review any claim of error not raised in the lower court, with exceptions not relevant here. RAP 2.5(a); *Brower v. Ackerley,* 88 Wn. App. 87, 96, 943 P .2d 1141 (1997) (issues not briefed or argued in trial court will not be considered on appeal), *review denied,* 134 Wn.2d 1021, 958 P.2d 315 (1998); *Espinoza v. City of Everett,* 87 Wn" App. 857, 872-73, 943 P.2d 387 (1997), *review denied,* 134 Wn.2d 1016 (1998) (theories advanced for the first time on appeal generally will not be considered).

The purpose of this rule is to allow the lower court the opportunity to consider all issues and arguments and correct any errors, thereby avoiding unnecessary appeals and retrials. *Smith v. Shannon,* 100 Wn.2d 26, 37, 666 P.2d 351 (1983). "The same rationale requires parties to inform a court acting as trier of fact of the rules of law they wish the court to apply." *Smith,* 100 Wn.2d at 37. This court's refusal to consider a significant factual question raised for the first time on appeal is proper, even where the question properly raised below may have presented a defense to an action in equity. See *Berg v. Ting,* 125 Wn.2d 544, 555, 886 P.2d 564 (1995) (purchasers claimed for the first time on appeal they were bona fide purchasers for value). This

court's refusal to consider a claim raised for the first time is proper even where, had the claim been raised below, the record might have developed differently. *Puget Sound Inv. Group, Inc. v. Bridges,* 92 Wn. App. 523, 528, 963 P .2d 944 (1998) (trial court did not have opportunity to decide whether plaintiff had already cleared its title).

It is true that we may address an issue raised for the first time if we choose to; it is equally true that we "are not bound to do so and usually refuse." *Smith,* 100 Wn.2d at 38. We choose not to address the issue in this case because the equities weigh heavily against the appellant. See, e.g., *Smith,* 100 Wn.2d at 38 (choosing not to address issue raised for the first time where equities weigh against appellant). He attempted to defraud a creditor. He has taken inconsistent positions. He delayed challenging the sheriff's sale on the grounds stated in this appeal for more than seven years. The parties to the settlement agreement reasonably relied on the trial court's decision. They would be injured by the additional cost of litigation should Stein be allowed to, pursue the will contest.

Because we decline to review Stein's claim that the lower court lacked the authority to approve the settlement agreement the agreement stands. Because the settlement agreement stands, we need not consider the additional issues raised by Jack Stein.

B. ATTORNEYS' FEES AND COSTS

Welch, the personal administrator of the Stein Estate, contends he should be awarded attorneys' fees under RCW 11.96A.150(1) for responding to Stein's argument that he should have been removed as personal administrator. Stein's contention, although now moot, was not completely without merit. We deny the award of attorneys' fees.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

/s/ QUINN-BRINTNALL, J.

We concur:

/s/ SEINFELD, P.J.

/s/ HOUGHTON, J.

WASHINGTON SUPREME COURT

In re the Estate of	)	
	)	
NICHOLAS A. STEIN,	)	No. 71531-9
	)	
Deceased.	)	
	)	

ORDER DENYING DISCRETIONARY REVIEW
FEBRUARY 5, 2002

Department I of the Court considered this matter at its February 5, 2002, Motion Calendar, and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the Petition for Review is denied.

DATED at Olympia, Washington this 5th day of February, 2002.

/s/ GERRY L. ALEXANDER
Chief Justice

CIRCUIT COURT OF OREGON
FOR MULTNOMAH COUNTY

In re the Estate of	)	
	)	
NICHOLAS A. STEIN,	)	No. 8708-91751
	)	
Deceased.	)	
	)	

ORDER ADMITTING WILL TO PROBATE AND APPOINTING PERSONAL REPRESENTATIVE
AUGUST 31, 1987

Upon the petition of Jack Kenneth Stein, the son of the decedent, for probate of the will of the above-named decedent, the court finds the allegations to be true.

IT IS THEREFORE ORDERED:

1. The will dated March 17, 1987 is the last will of the decedent above named and the will is hereby admitted to probate.

2. Jack Kenneth Stein is appointed personal representative of the estate.

3. The personal representative is not required to file a bond, and letters shall be issued forthwith to the personal representative in the manner provided by law.

DATED: August 31, 1987

/s/ [Signature]
Judge

CIRCUIT COURT OF OREGON
FOR MULTNOMAH COUNTY

In re the Estate of	)	
	)	
NICHOLAS A. STEIN,	)	No. 8708-91751
	)	
Deceased.	)	
_____	)	

PETITION FOR ORDER DIRECTING
PERSONAL REPRESENTATIVE TO MAKE
PARTIAL DISTRIBUTION
MARCH 24, 1988

COMES NOW, TAMI IRENE STEIN, by and through her attorney, HOWARD H. MARSHACK, and petitions the Court for an Order directing the personal representative to distribute to Tami Stein, the sum of $50,000.00 cash in satisfaction of the cash bequest to her set forth in Page 2 of the Last Will and Testament of Nicholas A. Stein, dated April 13, 1987. Petitioner alleges that after such distribution, if granted, there will remain sufficient assets to pay for expenses of administration, unpaid claims and known unpaid creditors of the estate and that such a distribution may be made without loss to creditors or injury to the estate or to any interested person....*

DATED this 24th day of March, 1988.

/s/ HOWARD H. MARSHACK
Of Attorneys for Tami Irene Stein

WASHINGTON COURT OF APPEALS
DIVISION TWO

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 13157-9
	)	
JOHN KENNETH STEIN,	)	
	)	
Defendant.	)	
	)	

ORDER OF DISMISSAL
SEPTEMBER 17, 1991

THIS MATTER comes before the undersigned to dismiss the above-referenced appeal as it appears to have been abandoned. A review of the file indicates that the clerk's papers and verbatim report of proceedings have not been filed as previously ordered in the Conditional Order of Dismissal and that dismissal is warranted. Accordingly, it is

ORDERED that the above-referenced appeal is dismissed.

DATED this 17 day of September [1991].

/s/ DONALD G. MEATH
Court Commissioner

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

JACK K. STEIN,	)	
	)	
Petitioner,	)	No. C91-5523B
	)	
v.	)	
	)	
TANA WOOD,	)	
	)	
Respondent.	)	
	)	

PETITION FOR HABEAS CORPUS RELIEF
TRANSCRIPT OF COURT'S ORAL DECISION
BEFORE THE HONORABLE ROBERT J. BRYAN
MAY 15, 1995

[2] THE COURT: Preliminarily -- well, to start the record, this is Stein versus Wood, No. 91-5233.

I would like to have the clerk file the original depositions that I read that are part of the record in this matter. I have those, and they have not yet been filed, but they are the depositions of Bonnie Lainhart, James Frame, Gordon Jones, and Dennis Hunter. In the absence of objection, unless there is some objection, I will just file those with the clerk's office and they will be part of the record of this case.

This comes before the court for a decision following evidentiary hearing that was granted pursuant to 28 United States Code Section

2254(d) and pursuant to the case of Sumner v. Mata, found at 449 U.S. 539 at page 536. At issue in this proceeding are requests for habeas relief based on, first, denial of effective assistance of counsel during the appellate process; and second, excessive delay in the appellate process amounting to a due process violation. These issues are closely intertwined. It is clear that the petitioner, Mr. Stein, has exhausted his state remedies on these issues.

I will make oral findings of fact and conclusions of law here this morning pursuant to Federal Rule of Civil Procedure 52(a), making written findings of fact and conclusions of law unnecessary.

While there may be a question of whether the habeas corpus amendments found in the Antiterrorism and Effective Death [3] Penalty Act of 1996 apply here, the same result follows, with or without consideration of those amendments.

I am mindful of the presumption of correctness that the findings in state court has in these matters. The findings I make here are based on a clear and convincing standard rather than just a preponderance of the evidence standard. These findings, however, are not intended to cover every detail that supports them. To some extent, the findings will be conclusory findings as opposed to a recitation of every detail that supports those conclusions.

The file reflects that Mr. Stein is not incompetent, but that he was not competent to represent himself on appeal in this case, on direct

appeal, nor is he competent to represent himself on his habeas corpus petition. That finding is based on the contents of the voluminous record here.

Mr. Stein was convicted of multiple counts of attempted murder in a second trial in July of 1989, and he was sentenced to 45 years imprisonment in the Superior Court of the State of Washington for Clark County. He then filed a timely pro se notice of appeal, and he also filed pro se a designation of clerk's papers and a statement of arrangements. The latter two filings were not adequate under the State Rules of Appellate Procedure, but they were made.

In January of 1990, Mr. Stein timely employed counsel on appeal, Mr. Lee, and through Mr. Lee arranged for the necessary [4] verbatim report of proceedings from three different court reporters that had covered his trial. The object of Mr. Lee's representation of Mr. Stein never varied. It was, at least, to perfect Mr. Stein's appeal. The perfection of the appeal is the issue in this case; that is, filing of the notice of appeal, designation of clerk's papers, filing a statement of arrangements, and filing what was necessary of a verbatim report of proceedings. All of those are as required under the State Rules on Appellate Procedure to perfect an appeal.

The question of responsibility for prosecuting the appeal beyond perfecting it is somewhat cloudy here, but the appeal was dismissed for want of perfection, and it's not necessary in these proceedings to examine beyond that stage. I am

not going to get into the question of what should have been done if the appeal had been perfected.

By the spring of 1990, the relationship between Mr. Stein and Mr. Lee fell apart. Mr. Stein attempted to fire Mr. Lee, and over time Stein filed appropriate pro se pleadings. He made a bar complaint against Mr. Lee and attacked him and his legal representation in writing.

It should be noted that Mr. Stein is the most difficult of clients, and not just in regard to his relationship with Mr. Lee, but certainly in regard to that relationship, he was a most difficult client. He attacks his attorneys, he attacks judges and prosecutors. He believes that there is a vast conspiracy [5] against him, and because of the nature of the offenses of convictions, some fear on the part of those he distrusts is not unreasonable.

Mr. Stein disagrees with and tries to fire virtually every lawyer that he's had whenever they don't get the results that he wants on an immediate basis, but nevertheless, in spite of that, he has never waived his right to direct appeal, nor has he waived any of his constitutional rights that are at issue in this proceeding. In spite of the fact that he is a difficult client, he is entitled to constitutional protections.

Over the next several months, after March and April of 1990 when Mr. Stein attempted to fire Mr. Lee, the stormy relationship continued and Mr. Lee attempted to withdraw. His withdrawal from representation of Mr. Stein was rejected by the Court of Appeals and he remained counsel of record throughout the relevant period, the period

relevant to these habeas proceedings.

Because of Mr. Stein's attempt to fire him and because of Mr. Stein's abusive conduct towards him, Mr. Lee effectively abandoned Mr. Stein and any attempt to perfect his appeal. Mr. Lee now, erroneously, takes the position that he could not do anything for Mr. Stein after being fired by Mr. Stein in the spring of 1990. He was still in the case, however, as is reflected by the Court of Appeals' rejection of his withdrawal motion, and as is reflected by Mr. Lee's own correspondence in [6] the record and his own activities in regard to the appeal. Clearly, he had a continuing duty to Mr. Stein to perfect the appeal.

Mr. Lee believed, and apparently still believes, that Mr. Stein's appeal was not frivolous and that he had meritorious issues to raise on direct appeal.

I indicated that Mr. Lee abandoned Mr. Stein and any attempt to perfect his appeal. There are a number of specific facts that show Mr. Lee's abandonment of his client. This is not necessarily an exhaustive list, but here are some of the things that lead me to that conclusion:

Mr. Lee did not speak to trial counsel. He did not review trial counsel's file even though it was offered to him.

He allowed his personal view of Mr. Stein's competency to color his judgment regarding Mr. Stein's credibility and to color his judgment regarding his own, that is Mr. Lee's, actions. His view was that Mr. Stein was not competent, and

he let that personal view inappropriately affect his judgment in regard to how he handled the case.

Mr. Lee inappropriately and in an untimely fashion disposed of Mr. Stein's files.

Mr. Lee did not follow through in getting the verbatim report of proceedings ordered and filed, although funds for that purpose were available to him. He did not file a proper designation of clerk's papers or a proper statement of [7] arrangements, and as near as I can tell and recall, he never really examined into what his client had done in regard to filing those documents.

When problems with producing court reporter Langer's part of the verbatim report of proceedings surfaced, Mr. Lee made no reasonable effort to perfect the record by either seeking or requiring production of and filing the existing originals or copies. He made no reasonable effort to order and file new copies. He did not monitor Mr. Langer's efforts to produce an original or a duplicate original or a copy. He made no effort to reconstruct the record by other methods. And he inappropriately relied on statements of his client's wife made against the best interests of his own client.

Mr. Lee ignored the Court of Appeal's orders, including sanction orders against him, and wrongly told his client to pay the sanctions. It is my understanding that the sanctions have not been paid to this date.

As reflected by his testimony here, Mr. Lee failed to understand his obligations to both

Mr. Stein, as his client, and to the court and apparently based his erroneous understanding of his duties on a negligently wrong misinterpretation of the case of State v. Dodd in which he had been involved.

On the 4th of January of 1991 the Court of Appeals remanded the case, the appeal of State v. Stein, to the Superior Court to settle the record, because by then, of course, the appropriate [8] necessary verbatim report of proceedings had not been filed. In spite of this opportunity to perfect the record, or to perfect the appeal, Mr. Lee's abandonment of the case and his client continued. He took no reasonable steps to settle the record. He did not request a timely hearing. When the prosecution did initiate a hearing, Mr. Lee did not plan for it or prepare for it and did not meaningfully participate in it. Although he knew that evidence was available laying blame for the missing part of the record on others than Stein, he did not arrange for the presentation of that evidence to the court. That evidence was available from court reporter Langer, from Mr. Stein himself, and also from Mr. Stein's wife, Bethany Norberg.

He made no effort to secure Mr. Stein's presence, although it was a fact-finding hearing at which Stein had a right to be present, and in spite of the fact that he knew that Mr. Stein wanted to be there.

He did not request that a verbatim record be made of the hearing, although substantial rights of his client were at issue. He allowed the

prosecutor to present the matter as essentially not in dispute, and by his apparent acquiescence and/or lack of a position at the remand hearing, Mr. Lee misled the court into believing and concluding that Mr. Stein personally was responsible for the missing transcripts when that was not true.

The result of the remand to settle the record was that [9] Stein was held responsible for perfecting the record. Clear and convincing evidence indicates to this court that the judge's conclusion was erroneous. Stein used due diligence in attempting to avoid the erroneous conclusion but was prevented by his attorney's inaction from presenting his own evidence, and it appears to me that no reasonable fact finder would have reached the conclusion that the superior court did reach at the remand hearing if Mr. Stein had minimally effective assistance of counsel at that hearing.

Even after the remand hearing and ruling, which occurred in August of 1991, Mr. Lee -- I believe that date is correct -- Mr. Lee had further opportunity to correct the injustice of the ruling and to perfect the appeal, but he not only did not do so, but made no effort to do so. The result of these events and the remand to settle the record was that Mr. Stein's direct appeal was dismissed by the Washington State Court of Appeals.

Since the dismissal of the appeal, Mr. Stein has been trying to reinstate his appeal, although his efforts and the issues regarding what happened to his appeal have been somewhat

clouded by Mr. Stein's pro se efforts and by his attacks on anyone who disagrees with him or his approach to this matter. His attacks have included attacks on judges, including me; on all of his attorneys, including Mr. Flegenheimer; and all prosecutors who have been involved in the case; as well as others. I am not aware, counsel, that he has attacked the [10] Attorney General's office or assistant attorneys general individually, but I would expect if he has not, he may.

Indeed, if this court had not required Mr. Flegenheimer to stay in the case over Mr. Stein's objection, as Mr. Lee was required to stay in the case over Mr. Stein's objections at the direct appeal process, this court probably would never have been able to deal with the issue of whether Mr. Stein's right to appeal was unconstitutionally taken from him by ineffective assistance of counsel or for any other reason.

In any event, Mr. Lee's abandonment of Mr. Stein's appeal and of Mr. Stein amounted to ineffective assistance of counsel under the Strickland case test and certainly prejudiced Mr. Stein because that was the cause of the loss of his right to direct appeal.

Now let me turn my attention next to the actions of other players in this matter who also by their actions deprived Mr. Stein of due process rights by causing excessive delay in the appellate process.

First, the official court reporter, Mr. Langer. I note that Mr. Langer is an official court reporter. He at least was, at the time in issue here, an

officer of the court and had obligations to the court and the public, as well as a contractual obligation to Mr. Stein. He was the author or the transcriber, taker and transcriber of the part of the verbatim report of proceedings that was missing and that was the subject [11] of the remand to settle the record. He failed in many ways.

First, he should have filed the original transcript with the court when it was completed instead of delivering it to a third party. There was not a rule that required that, but it was the custom and practice, certainly, at that time, and he should have seen to the filing of the original.

When he was made aware that the original was not filed by the third party, he should have immediately filed a duplicate original or a copy or prepared an additional copy or original and filed it. That should have been done immediately and without delay as soon as he learned that the original had not been filed, as he expected it was going to be filed, by the third party, who was Mr. Stein's stepson, I gather.

The Clark County Clerk's Office also failed in their duties, not only to Mr. Stein, but also to the court and the public. They should have filed what they did have in the way of a report of proceedings with the Court of Appeals. They did not file it, as required, and as I understand the evidence, they are still holding the report of proceedings, although it has now been completed, and they should have filed it timely when it was filed with them. They should have filed it, that is with the

Court of Appeals.

The prosecutor, Mr. Hunter, also was a part of this unfortunate scenario. I want to note that the clerk is also an officer of the court, acting on the court's behalf. The [12] prosecutor is an officer of the court, also acting on the court's behalf, as any lawyer is. The prosecutor gave bad advice to the clerk to hold the file until all the report of proceedings was in, and then failed to give appropriate advice to tell the clerk when everything was in so the clerk could file the report of proceedings. The clerk, after getting the advice from Mr. Hunter to hold the file until everything was in, has no way of knowing when the report of proceedings was complete, and Mr. Hunter failed to follow up by giving them that information. It seems to me that Mr. Hunter took on the duty when he undertook to advise the clerk; particularly in a matter in which he represented a party to the dispute in the case, he took on the duty to advise the clerk fully in regard to the requirements of filing the report of proceedings.

All of the report of proceedings that was in issue was in the Clark County Clerk's Office before the mandate came down from the Court of Appeals dismissing the direct appeal. It's an open question as to whether that mandate would have been withheld if the Court of Appeals had been aware that the record was finally settled to perfect the appeal.

The prosecution also failed in its duties in the way that the hearing to settle the record was set up and conducted. The prosecution, without

knowing the truth regarding these transcripts and without investigating the facts adequately, presented an untruth to the court, which I think the prosecutor [13] believed in good faith, but he presented an untruth as a fact, that this was all Mr. Stein's fault. In addition to that, he failed to protect the criminal defendant's due process rights to be present and to have a record made, and that was less than one would hope of a prosecuting attorney who represents not only the state, but also is an officer of the court and has a duty to the public beyond getting and holding convictions.

The superior court judge, Judge Borst, also, unwittingly, I expect, participated in this unfortunate matter. He should have had the defendant present at this fact-finding hearing to settle the record. He should have had a reporter present to make a verbatim record of what occurred, and he should have had evidence before him on which to base a finding as to the responsibility for the incomplete verbatim report of proceedings. Although, in his defense, I should say, it probably appeared to him to be an agreed set of facts between the plaintiff and the defendant made, through that agreement, by defendant's counsel of record. I expect that it appeared to him that it was essentially a stipulated factual matter.

While Mr. Stein's call direct to Judge Borst was not appropriate since he was a litigant represented by a lawyer, that call should have put the judge on inquiry at least regarding Mr.

Stein's presence and participation in this record settlement proceeding. There is no record to tell us what, if anything, was made of that call by the judge or by counsel.

[14] And lastly, the judge should have had notice of the remand to settle the record from the Court of Appeals and should have set a more timely hearing rather than just waiting for someone to set a hearing up, as the prosecutor did. I have no way of knowing whether he personally had notice that the case was remanded to him or not.

Those are the necessary findings of fact in this matter, and from those findings conclusions of law follow.

The first conclusion of law is, in a way, a mixed finding of fact and conclusion of law. This is an obvious shortcut, but in regard to the question of ineffective assistance of counsel, I simply agree with everything that Professor Strait said. He was credible, and his opinions are consistent with the law and the duty of counsel, as I know it, and his opinions were not seriously here attacked. I accept those, his conclusions, in regard to the ineffective assistance of counsel.

The second conclusion of law is that Mr. Stein was denied effective assistance of counsel in regard to perfecting his direct appeal, as a result of which he was prejudiced by the dismissal of his direct appeal.

The third conclusion is that Mr. Stein was denied his due process rights due to excessive

delay in the appellate process caused by officers of the court, separate and apart from his own attorney, and this delay also prejudiced him in that it was also a cause of the dismissal of his appeal.

[15] The fourth conclusion is that the two aforementioned constitutional violations independently justify habeas relief but are factually closely entwined together and combine to show a clear violation of Mr. Stein's right to effective assistance of counsel on appeal and his right to due process of law on appeal.

Fifth, any presumption of correctness in the state fact-finding process regarding dismissal of the appeal is overcome by clear and convincing evidence presented in this habeas proceeding. The fact finding of Judge Borst that was then relied on by the Court of Appeals, and the Supreme Court in later proceedings, should be set aside in this court under the authority of 28 United States Code Section 2254(d}, and specifically because the merits of the factual dispute regarding either responsibility for the missing record and regarding ineffective assistance of counsel were not resolved in the state court proceeding because the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; because the material facts were not adequately developed at the state court hearing; because the applicant, that is Mr. Stein, did not receive a full, fair, and adequate hearing in the state court proceeding; because Mr. Stein was otherwise denied due process of law in the state court

proceeding; and because this court has concluded, based on the record as a whole, that the factual determination is not fairly [16] supported by the record. Those last findings are consistent with subparts 1, 2, 3, 6, 7, and 8 of the statute, of 28 USC 254 (d).

The sixth conclusion of law is that the appropriate remedy under Lozada v. Deeds, 964 F.2d 956, and Coe v. Thurman, 922 F.2d 529, is to set aside the state court's order dismissing Mr. Stein's direct appeal and to reinstate the appeal subject to the Washington State Rules of Appellate Procedure. An order and a writ of habeas corpus will issue, and I have prepared that order and writ, and it indicates that the writ is granted and that the respondent shall release the petitioner from custody within 90 days of the date of this order if he is not afforded a right to direct appeal pursuant to the Washington State Rules of Appellate Procedure.

The order further recites that timelines set by said rules should run from the date of this writ as though it were the date of entry of a trial court decision pursuant to Rules of Appellate Procedure 5.2(c). All proceedings, including but not limited to request for counsel, notice of appeal, perfection of appeal, briefing, and argument should be conducted pursuant to the Rules of Appellate Procedure. In other words, the order and writ puts this case back in the same position that it was in on the day the judgment of conviction was signed.

That's the findings, conclusions, and the order of the court in this matter.

[17] Now, I want to do a couple more things.

Mr. Flegenheimer's participation in this matter with this judgment is effectively concluded. The burden will be on Mr. Stein from here on to follow the state court rules if he wants the direct appeal that he indicates he's been seeking for all these years.

I am concerned about his ability to process an appeal on his own. As I indicated, I personally don't think he's competent to do that. I have no idea of his current financial status, as to whether he can afford a lawyer or not. He needs at least to be steered into the appeal process and the Rules of Appellate Procedure regarding filing notice of appeal. Although he filed one, I think it's appropriate that he file another since we're starting everything from scratch, and he needs to know how to seek counsel if he is indigent. I suspect that someone should advise the clerk as to what to do with the transcript they have, and someone should tell Mr. Stein what he must do to perfect his appeal at this stage.

I guess what I'm saying, Mr. Flegenheimer, is that I would appreciate it if you would carry this two steps further by assisting Mr. Stein with the filing of his notice of appeal, if he chooses to do so pro se, and advise him, maybe by being sure he has a copy of the State Rules on Appellate Procedure, as to what he must do to seek counsel and to get the matter, the appeal, perfected. I am not asking that you give him further [18] legal advice, only that mechanically it seems to me that he needs to be steered in the right direction, and

that should be the end of your representation of him.

I expect, Mr. Flegenheimer, that you will want to order a transcript of this, of these findings and conclusions and decision, on his behalf, and I would expect that you would want the court reporter to send a copy of that direct to Mr. Stein.

Am I second-guessing you too much?

MR. FLEGENHEIMER: No, that's correct, Your Honor. Immediately after this proceeding I will go down and get the order form and present it to the court.

THE COURT: I think that's appropriate. I guess I'm concerned, in light of what's happened here, that Mr. Stein get a copy of this proceeding this morning, a transcript of it, as soon as possible so that he can understand what happened and will not be further confounded by the problems of court reporters and so forth.

I might add to this that I have no idea whatsoever about what went on at the trial, whether he has grounds that should be argued on appeal or whether there was error in the record, whether he was guilty of what he did or didn't do. Those things are not the subject of this proceeding. All I know is that he does have a right to a direct appeal that was unconstitutionally taken from him.

Counsel, I want to thank both of you for -- or all of you, [19] I should say -- for your efforts in this matter. It has not been easy. It particularly has not been easy for Mr. Flegenheimer, as we

know from the record in his attempts to withdraw and Mr. Stein's attempts to fire him, but certainly Mr. Flegenheimer's continued efforts in Mr. Stein's behalf have been in the highest traditions of our profession. I want to extend my personal appreciation to Mr. Flegenheimer for staying in this matter, in a difficult situation, and doing the best he could with it. While he didn't win on a lot of the points that Mr. Stein raised, he won on this important point, which certainly is to his credit, and is an indication of considerable work and legal ability in bringing this difficult matter to this conclusion. One can only hope that ultimately in this matter, if the appeal is prosecuted and ruled on, on its merits, that justice will be done.

Thank you. I'm closing my file on the Stein matter at this point.

(Recessed at 10:20 a.m.)

WASHINGTON COURT OF APPEALS
DIVISION TWO

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	No. 20813-0-II
	)	
JOHN KENNETH STEIN,	)	
	)	
Appellant.	)	
	)	

EXCERPTS FROM OPINION
PARTIALLY PUBLISHED AT 972 P.2d 505
FEBRUARY 26, 1999

SEINFELD, P.J. — Jack Stein appeals his convictions of three counts of attempted murder and one count of burglary. We conclude that the court's instructions erroneously allowed the jury to convict Stein on the basis of vicarious liability without finding that he was legally accountable as an accomplice.[1] Because this is prejudicial error, we reverse....*

[1]Stein raises numerous other issues in his appeal and in his Petition for Habeas Relief, which we have consolidated with his direct appeal.

DISCUSSION

I. VICARIOUS LIABILITY INSTRUCTIONS...*

A. Preservation of Issue on Appeal

The *Pinkerton* instructions immediately followed the accomplice liability instructions; together they provided two alternative theories of vicarious liability - one based upon the accomplice liability statute, RCW 9A.08.020, and the other based loosely upon the federal *Pinkerton* doctrine. Using the *Pinkerton* instruction, the jury could have found Stein guilty of murder and burglary without finding proof of each element of accomplice liability.

Jury instructions that omit an element of the charged crime present an error of constitutional magnitude. *State v. Scott,* 110 Wn.2d 682,688 n.5, 757 P.2d 492 (1988) (citing *State v. Johnson,* 100 Wn.2d 607, 623, 674 P.2d 145 (1983), *overruled on other grounds in State v. Bergeron,* 105 Wn.2d 1,711 P.2d 1000 (1985)). The error alleged here was tantamount to omitting an essential element of the charged crime. Because a failure to object to such an error below does not preclude appellate review, we consider Stein's claimed error. *Scott,* 110 Wn.2d at 685 n.5, 690; *Johnson,* 100 Wn.2d at 623.

B. *Pinkerton* Liability in Washington

Under the federal *Pinkerton* doctrine, a defendant may be liable for the substantive acts of others upon proof that (1) the defendant was guilty of conspiracy, (2) a co-conspirator committed the substantive crime pursuant to and

as a reasonably foreseeable consequence of the conspiracy, and (3) the defendant was a member of the conspiracy at the time the crimes were committed. *Pinkerton,* 328 U.S. at 645-47;...*

We find no Washington cases citing *Pinkerton* as the basis for vicarious criminal liability....* But because the *Pinkerton* instructions that the trial court gave here were fatally defective, we leave for another day the question of the doctrine's applicability in this jurisdiction.

The court's *Pinkerton* instructions were defective because they failed to advise the jury that it could not hold Stein liable for the substantive acts of co-conspirators unless it also found Stein guilty of conspiracy. Thus, even assuming the applicability of the doctrine, the instructions were defective because they failed to include all the doctrine's essential elements. *See State v. Smith,* 131 Wn.2d 258, 263-64, 930 P.2d 917 (1997); *State v. Eastmond,* 129 Wn.2d 497, 502-03, 919 P.2d 577 (1996).

C. Harmless Error

The State suggests that accomplice liability and *Pinkerton* liability are virtually the same. Based upon this premise. it contends that the erroneous *Pinkerton* instructions were harmless. We disagree.

We presume that an instructional error is prejudicial unless the State satisfies its burden of affirmatively showing harmless error. *Smith,* 131 Wn.2d at 263-64. Failure to instruct on an element of offense is reversible error. *Smith,* 131

Wn.2d at 265; *Eastmond,* 129 Wn.2d at 503 (omission of an element of the crime is fatal error because it relieves the State of its burden of proving every essential element beyond a reasonable doubt); *State v. Garcia,* 65 Wn. App. 681, 691, 829 P .2d 241 (1992) (reversal required even if there were valid instructions if jury might have convicted relying upon other instructions for which conviction was impermissible).

The *Pinkerton* instructions in this case provided for substantially broader liability than did the accomplice liability instructions....*

The accomplice liability and *Pinkerton* instructions contain significant differences and there is no basis to conclude that the jury relied on the correct accomplice liability instructions in reaching its verdicts. By permitting the jury to convict Stein under an improper theory, the court relieved the State of its burden of proving beyond a reasonable doubt every essential element of accomplice liability. Accordingly, the instructional error was of constitutional magnitude and it was not harmless; we must reverse the convictions. *Smith,* 131 Wn.2d at 264....*

We reverse and remand for a new trial.

/s/ SEINFELD, P.J.

We concur:

/s/ HOUGHTON, J.

/s/ HUNT, J.

WASHINGTON SUPREME COURT

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 68112-1
	)	
JOHN KENNETH STEIN,	)	
	)	
Defendant.	)	
	)	

EXCERPTS FROM EN BANC OPINION
PUBLISHED AT 27 P.3d 184
JULY 12, 2001

FACTS

BRIDGE, J. — *...[186]...Stein was arrested on July 28, 1988. He was charged with seven counts: conspiracy to commit first degree murder, felony murder of Lund, aggravated first degree murder of [Thelma] Lund, three counts of attempting to commit first degree murder of [Ned] Hall, and one count of first degree burglary. The case ended in a mistrial.

On retrial, Stein filed a motion to remove his counsel on the grounds of conflict of interest and irreconcilable differences. On June 8 1989, the trial court denied the motion, finding that Stein had consented to the representation, no conflict of interest existed, and there were no irreconcilable differences. The case proceeded to trial. The jury

acquitted Stein of conspiracy and the murder charges related to Lund, but convicted him of four counts related to Hall, all based on vicarious liability. Stein had not excepted to any of the vicarious liability instructions.

After Stein was sentenced to a total of 540 months, he filed a timely notice of appeal. His appellate counsel, Darrell Lee, was sanctioned three times for failure to perfect the appeal. On August 8, 1991, the appeal was dismissed. But on May 15, 1996, the Federal District Court, Bryan J., ordered the appeal reinstated, holding that with minimally effective assistance of counsel on appeal, no reasonable fact finder would have concluded that the defendant was responsible for failure to perfect the appeal. The court also held that the excessive delay in appeal had denied the defendant his due process rights.

Stein later filed a motion for habeas corpus, which was converted to a personal restraint petition and consolidated with the appeal. The Court of Appeals, Division Two, reversed and remanded on the grounds that the court's instructions allowed the jury to convict Stein of vicarious liability for the substantive crimes committed by his alleged coconspirators without finding him guilty of the underlying conspiracy. The State filed a petition for review by this court, and Stein cross-petitioned. We granted review.

ANALYSIS

The threshold question presented is a procedural one, i.e., whether the trial court's instructions to the, jury contained a manifest

error affecting a constitutional right, allowing the defendant to challenge the instructions on appeal without having taken exception to them at trial. *See State v. Stearns,* 119 Wash.2d 247, 250, 830 P.2d 355 (1992); RAP 2.5(a)(3).

An error is manifeat when it has practical and identifiable consequences in the trial of the case. *State v. Green,* 80 Wash. App. 692, 694, 906 P.2d 990 (1995) (citing *State v. Lynn,* 67 Wash. App. 339, 345, 835 P .2d 251 (1992). If the instructions allowed the jury to convict Stein without finding an essential element of the crime charged, the State has been relieved of its burden of proving all elements of the crime(s) charged beyond a reasonable doubt, and thus the error affected his constitutional right to a fair trial. A defendant cannot be said to have a fair trial "if the jury might assume that an essential element need not be proved." *State v. Smith,* 131 Wash.2d 258, 263,930 P.2d 917 (1997) (citing *State v. Johnson,* 100 Wash.2d 6O7, 623, 674 P.2d 145 (1983)). Failure to instruct on an element of the offense is thus error of constitutional magnitude. *Id.* Here the instruction to the jury may be so construed. Therefore, the error was manifest and of constitutional magnitude....*

CONCLUSION

[190]...In Washington, the conspiracy statute (RCW 9A.28.040(1)) predicates liability on the accomplice liability statute (RCW 9A.08.020). Knowledge of the particular crime committed is an essential element of accomplice liability. Absent that knowledge, Washington law does

not allow conviction for crimes committed by coconspirators, whether or not they are foreseeable. Thus, the *Pinkerton* doctrine is inapplicable to Washington law. We remand for a new trial, leaving to the sound discretion of the trial court the question of whether further relief is appropriate under CrR 8.3, or other theories raised in Stein's cross-petition.

ALEXANDER, C.J., SMITH, IRELAND, JOHNSON, CHAMBERS, MADSEN, and OWENS, J.J., concur.

SANDERS, J. (dissenting) — *...The constitutional deprivation visited upon Mr. Stein is the six-and-one-half-year delay in his criminal appeal. The delay violates Stein's right to a speedy trial. No remedy aside from dismissal of charges pursuant to CrR 8.3(b) makes sense...*

I disagree with the majority's decision to leave this remedy to the discretion of the trial court on remand. The constitution is mandatory, not discretionary...*

I therefore dissent.

SUPERIOR COURT OF WASHINGTON
FOR CLARK COUNTY

MARLENE WINCHESTER, personal representative of the Estate of Thelma Lund, Plaintiff,	)	
v.	)	No. 88-2-03442-1
JOHN KENNETH STEIN, et al., Defendants.	)	
STATE OF WASHINGTON, Plaintiff,	)	
v.	)	No. 90-2-01626-2
JOHN KENNETH STEIN, et al., Defendants.	)	

ORDER AUTHORIZING CONSOLIDATION
JULY 17, 1990

THIS MATTER having come regularly before the court upon the motion of plaintiff, State of Washington ex rel. Arthur D. Curtis, for an Order Authorizing Consolidation of the above-entitled cases, the court having reviewed said motion and supporting affidavit, having heard or invited

argument in support and opposition thereto, being fully advised in the premises thereof and finding good cause therefor; now, therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that trial of the above-entitled causes should be and the same hereby are ordered to be consolidated for trial.

DONE IN OPEN COURT this 17th day of July 1990.

/s/ H. JOHN HALL
Judge of the Superior Court

SUPERIOR COURT OF WASHINGTON
FOR CLARK COUNTY

MARLENE WINCHESTER, personal representative of the Estate of Thelma Lund, Plaintiff, v. JOHN KENNETH STEIN, et al., Defendants.	)	No. 88-2-03442-1
STATE OF WASHINGTON, Plaintiff, v. JOHN KENNETH STEIN, et al., Defendants.	)	No. 90-2-01626-2

CONSOLIDATED CIVIL ACTIONS
TRANSCRIPT OF TRIAL PROCEEDINGS
JANUARY 7, 1991

[37] THE COURT:...Now, it is my intent to cover pretrial motions this afternoon....*[38] This morning I was presented with an additional motion filed by Mr. Barlow for matters in limine with regard to ...*[f]irst of all, your order in limine

ordering the defendant and the defendants' witnesses not to directly or indirectly mention, comment, question or by any other reference whatsoever attempt to convey to the jury that the Defendant Stein was found not guilty of charges arising out of the murder of Thelma Lund. The second is that the Court take judicial notice of the convictions of all four defendants. The third is that the defendants be collaterally estopped from denying the facts essentially for the defendants' convictions....*

[164] THE COURT: Next motion I have is the plaintiff's motion in limine. Mr. Barlow.

MR. BARLOW [Attorney for the Lund Estate]: Would you prefer that I take them up—

THE COURT: One at a time.

MR. BARLOW: The first motion is reference to the admissibility of the finding of not guilty....*

[168] THE COURT: I believe for the defense's benefit, there is an exception under Evidence Rule 803(a)(22), and I think it's alleged in Mr. Barlow's memorandum of authorities that allows evidence of criminal convictions to be admitted. Converse of that is that not guilty findings are normally inadmissible to prove that an incident did not happen. And there is substantial case law on that point.[169] I'm going to grant the motion in limine with regard to the not guilty finding and that would be an instruction to each of the defendants and their witnesses to not directly or indirectly mention, comment, question or by any other reference whatsoever attempt to convey to the jury

that Mr. Stein was found not guilty of the charges arising out of the murder of Mrs. Lund....*

[171] THE COURT: ...Let's get to the second motion in limine with regard to the convictions. Mr. Barlow.

MR. BARLOW: Thank you, Your Honor. It's uncontradicted, I believe we will find out and I'm asking the Court to take judicial notice of the four convictions that are listed. I will skip Mr. Norberg's and come back to that. Jack Stein's conviction of three counts of attempted murder and one count of first degree burglary with regard to Ned Hall. C, Richard Bailey guilty plea and then judgment and sentence for accomplice to murder of Thelma Lund and for attempted murder of Ned Hall and D, for Gordon Smith's plea or conviction for attempted murder of Ned Hall....*

[181] THE COURT: With regard to a ruling on your motion, on Michael Norberg, I'll take judicial notice of Michael Norberg's guilty plea and conviction thereupon for conspiring, for conspiracy to commit murder as charged in the -- let's back up just a moment, are we looking at what's called the second [182] amended information?

MR. HUNTER [Deputy Prosecutor for Clark County representing the State of Washington]: Yes, Your Honor.

THE COURT: That's the one you're relying on?

MR. BARLOW: Yes.

THE COURT: That states that Michael Norberg in the County of Clark, State of Washington, on or between the months of June of 1994 and June 14th, 1987 with intent; that conduct constituting the crime of murder in the second degree be performed, did agree with John Kenneth Stein caused [sic] the death of one or more human beings....*

THE COURT: I'm making my ruling now based upon the arguments that's already been presented....* I'll take judicial notice of Mr. Michael Norberg's guilty plea and conviction for conspiring with John Kenneth Stein to cause the death of one or more human beings...*

[184] THE COURT: Going on with regard to the requests for judicial notice of Mr. Stein's conviction. I'll approve it for three counts of attempted murder and one count of first degree burglary, omitting again the identity of the potential victim. Same with Mr. Bailey's guilty plea and conviction thereon accomplished for murder and attempted murder, eliminating the identity of the victims....*

[186] THE COURT: Number three.

MR. BARLOW: As number three points out, and I'm relying on the brief with regard to number three. Specifically, section 4(a), as I mentioned, evidence rule 803(a)'(22) is clear. RCW 9A.82 is Mr. Hunter's part of the case which we dovetail with it's clear, and in addition, the court case of *Seattle First against Kanoker. Atkison and Smith* (phonetic) are very, very clear. That where the conviction was for the specific elements that is

necessary to prove a civil action, collateral estoppel applies.

Based upon the Court's judicial notice, omitting the name of the victim, I'm somewhat confused as to whether we are there yet, whether we need to make a motion at some later time, but it's clear I submit from the record that the statements of the defendants on the plea of guilty and from everything regardless of all of these claims now, I didn't do it, et cetera, but those are matters of public record. They were pleas that were made in open court and they're pleas that cannot be looked aside in this particular case. They're bound by those pleas.

[187] THE COURT: Does your motion go to estopping the defendants from denying?

MR. BARLOW: The essential facts, the facts essentially take, sustain a judgment of conviction, yes, Your Honor.

THE COURT: As I read evidence rule 803(a)(22), that only allows the existence of a conviction to be admitted under the rule rather than the essential facts or allegations that lead up to that conviction.

MR. BARLOW: That's why you then have to read *Seattle First against Kanoker,* a 1980 case, *Curackus against Smith* (phonetic), a 1977 case and one other case that was cited in our brief and also dovetailed in with statute 9A.88, I think 080 six or seven which indicates that there is collateral estoppel in that situation.

MR. HUNTER: It would be essential facts

under the statute, Your Honor, essential facts are in the allegations.

MR. BARLOW: Facts that sustained a conviction.

THE COURT: The language of the statute is a defendant convicted in a criminal proceeding — essential allegations of a criminal offense proven at a [188] criminal trial in which the defendant was convicted. I don't know what essential allegations are in that context, but I'm assuming they are the elements of the crime itself.

MR. BARLOW: I would assume those specified in the information and whatever that may be necessary to prove this.

THE COURT: But again, in reviewing that these defendants would not have the right to deny specific facts that may have occurred between the defendants prior to the offenses being committed.

MR. HUNTER: No, essentially what the position that we're taking, for instance, Mr. Stein would be precluded under the statute from denying involvement in three attempts to murder Ned Hall. Mr. Norberg would be precluded from denying the essential element of conspiracy to kill people and so forth. Mr. Bailey would be precluded fairly severely in light of his plea and Mr. Smith, Ned Hall's attempted murder....*

[194] THE COURT: Well, I can only rely upon the statute and that's the case or the statute available to the parties in this action. They're both parties, so I'll grant the order in limine in that respect.

The law, the way it's stated by the [195] legislature, and if you want to have it changed, you will have to have the legislature change it. That covers all of the pretrial motions, I believe....

SUPERIOR COURT OF WASHINGTON
FOR CLARK COUNTY

MARLENE WINCHESTER, personal representative of the Estate of Thelma Lund, Plaintiff,	)	Case No. 88-2-03442-1
v.	)	
JOHN KENNETH STEIN, et al., Defendants.	)	Judgment No. 91-9-00590-6
STATE OF WASHINGTON, Plaintiff,	)	Case No. 90-2-01626-2
v.	)	
JOHN KENNETH STEIN, et al., Defendants.	)	Judgment No. 91-9-00591-4

CONSOLIDATED CIVIL ACTIONS
JUDGMENT ON VERDICT
FEBRUARY 25, 1991

THIS MATTER came regularly on for trial between the 7th day of January, and the 1st day of February, 1991, before the Honorable John Hall, Judge of the Superior Court of Washington, for Lewis County, specially assigned to the above-entitled cause, plaintiff Winchester being represented by her attorney, John Barlow; plaintiff State of Washington being represented

by Deputy Prosecuting Attorney Dennis Hunter, and the defendants appearing personally, pro se. The jury was empaneled and sworn to try the cause, and evidence, in the form of testimony and documents, was presented. The Court instructed the jury, argument of the parties was had, and the jury retired to consider its verdict. Thereafter, the jury returned as its verdict the following answers to the following questions:

QUESTION 1: "Did the defendants listed below conspire to commit the offense of murder between May 1, 1984 and, and June 14, 1987, as alleged by the plaintiff, State of Washington?:"

ANSWER: [As to defendants Stein, Norberg and Bailey] "Yes."

QUESTION 2: "Did the defendants listed below attempt to commit Murder in the First or Second Degree or Extortion in the First Degree, on April 13, 1987 as alleged by the plaintiff State of Washington?"

ANSWER: [As to defendants Stein, Norberg and Bailey] "Yes."

QUESTION 3: "Did the defendants listed below cause the death of Thelma Lund on April 13, 1987 in one of the ways alleged by plaintiff Winchester, or plaintiff, State of Washington?"

ANSWER: [As to defendants Stein, Norberg and Bailey] "Yes."

QUESTION 4: "What are the total damages determined by the jury for injury to the person, the state [sic] or heirs of Thelma Lund?"

ANSWER: "$ 4,000,000.00."

QUESTION 5: "Did the defendants listed below attempt to commit the offense of Murder, in the First Degree, on June 1,1987, as alleged by the plaintiff, State of Washington?"

ANSWER: [As to all defendants] "Yes."

QUESTION 6: "Did the defendants listed below attempt to commit the offense of Murder in the First Degree, between June 1, and June 14, 1987, as alleged by the plaintiff, State of Washington?"

ANSWER: [As to all defendants] "Yes."

QUESTION 7: "Did the defendants listed below attempt to commit the offense of Murder in the First Degree, on June 14, 1987, as alleged by the plaintiff, State of Washington?"

ANSWER: [As to all defendants] "Yes."

QUESTION 8: "Did the defendants listed below engage in an act or acts of criminal profiteering, as defined in the court's instructions to the jury?"

ANSWER: [As to all defendants] "Yes."

QUESTION 9: "Did the defendants listed below engage in a pattern of criminal profiteering activity as defined in the court's instructions to the jury?"

ANSWER: [As to all defendants] "Yes."

QUESTION 10: "What are the total amounts of damages determined by the jury for the following:

A. For injury to the person or property of Ned Hall?"

ANSWER: "$8,200.00."

"B. For the costs and expenses incurred in the investigation and prosecution of the defendants?"

ANSWER: "$223,894.19."

No post-trial motions having been interposed, the court having reviewed and approved the cost bill of plaintiff, State If Washington, being fully apprised in the premises hereof, and on the basis of the foregoing verdict, now, therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Judgment be rendered in favor of the plaintiffs and against defendants as follows:

1. Plaintiff, Winchester, shall have Judgment against defendants Stein and Norberg, in Cause No. 88-2-03442-1, as and for the actual damages to the person and estate of Thelma Lund, in the amount of: $4,000,000.00

2. Plaintiff, State of Washington, shall have judgment against defendant [sic] Stein, Norberg and Bailey, in Cause No. 90-2-01626-2, in trust for the estate of Thelma Lund, in the amount of the actual damages to said estate times two (2), to-wit: $8,000,000.00

3. Plaintiff, State of Washington, shall have judgment against defendants Stein, Norberg, Bailey and Smith, in Cause No. 90-2-01626-2, in trust for Charles E. "Ned" Hall in the amount of the actual damages sustained by the said Charles

E. "Ned" Hall, in the amount of $8,200.00 times three (3), to-wit: $24,600.00

4. Plaintiff, State of Washington shall have judgment against defendants Stein, Norberg, Bailey and Smith, in Cause No. 90-2-01626-2 for the costs and expenses reasonably ard necessarily incurred by Clark County, Washington, in the investigation and prosecution of said defendants in the amount of: $ 223,894.19

5. Plaintiff, State of Washington, shall have judgment against defendants Stein, Norberg, Bailey and Smith, in Cause No. 90-2-01626-2 in favor of the Clark County, Washington Anti-Criminal Profiteering Revolving Fund by way of civil penalty in the amount of: $ 250,000.00

6. Plaintiff, State of Washington, shall have judgment against defendants Stein, Norberg, Bailey and Smith, in Cause No. 90-2-01626-2 as and for the costs and disbursements incurred by Clark County Washington in the above-entitled cause, including reasonable and necessary costs and expenses of investigation and trial, together with attorney's fees, in the amount of: $38.301.00

TOTAL JUDGMENT $12,536,795.19

The foregoing Judgments shall bear interest at the rate of twelve percent (12%) per annum from date hereof. [Judgment summary omitted.]

DONE IN OPEN COURT this 25th day of February, 1991.

/s/ H. JOHN HALL
Judge of the Superior Court

SUPERIOR COURT OF WASHINGTON
FOR CLARK COUNTY

MARLENE WINCHESTER, personal representative of the Estate of Thelma Lund, Plaintiff,	)	
v.	)	No. 88-2-03442-1
JOHN KENNETH STEIN, et al., Defendants.	)	

JACK STEIN'S MOTION TO VACATE JUDGMENT, VOID SHERIFF'S SALE AND DEED, AND VACATE CONFIRMATION ORDER
MAY 3, 1999

RELIEF REQUESTED

Defendant Jack Stein respectfully requests that an order be entered granting him the following relief:

1. That the judgment entered against him on the 25th day of February 1991 in favor of the plaintiff (Clark County Judgment No. 91-9-00590-6) be vacated;

2. That the *Sheriff's Deed on Execution and Order of Sale* in execution of the aforementioned judgment whereby the Clark County Sheriff, on the 7th day of November 1994, purported to convey to the plaintiff certain interests in property

belonging to Jack Stein be declared null and void; and

3. That any and all orders entered herein confirming said sheriff's sale and deed be vacated.

STATEMENT OF FACTS

This case was brought against Jack Stein and others to determine a claim by the plaintiff for damages arising from an alleged wrongful death. This wrongful death claim was consolidated for trial with an independent statutory action for damages, filed by the Clark County Prosecutor's Office, citing as its authority the Washington Criminal Profiteering Act.

On the 1st of September 1989, Jack Stein was found guilty of three counts of attempted murder and one count of burglary. *State v. Stein*, Clark County No. 88-1-00788-8. These convictions were admitted into evidence during the consolidated trial of this case as substantive evidence in support of the state's Criminal Profiteering Act claim.

The jury was instructed to answer questions on a special verdict form. Some of these questions had already been answered in typewriting by the Court at the time of their submission. Among these questions and answers were the following:

> 5. Did the defendants listed below attempt to commit the offense of Murder in the First Degree, on June 1, 1987, as alleged by the plaintiff, State of Washington?
>
> ANSWER: Defendant Stein Yes

6. Did the defendants listed below attempt to commit the offense of Murder in the First Degree, between June 1 and June 14, 1987, as alleged by the plaintiff, State of Washington?

ANSWER: Defendant Stein Yes

7. Did the defendants listed below attempt to commit the offense of Murder in the First Degree, on June 14, 1987, as alleged by the plaintiff, State of Washington?

ANSWER: Defendant Stein Yes

The jury awarded the plaintiff damages, for the wrongful death claim, in the amount of four million dollars. On the 25th of February 1991, the Court entered a judgment against Jack Stein in conformity with this verdict. This judgment has been assigned Clark County Judgment No. 91-9-00590-6.

On the 7th of November 1994, the Clark County Sheriff executed a *Sheriff's Deed on Execution and Order of Sale* which recited a judicial sale in execution of the wrongful death judgment.

On the 26th of February 1999, Division Two of the Washington Court of Appeals issued an opinion reversing each of Jack Stein's criminal convictions. *State v. Stein*, Wn. App. No. 20813-0-II.

ISSUES

1. Should the wrongful death judgment be vacated insofar as the jury was directed to find

that Jack Stein had committed four felonies, each of which has subsequently been reversed on appeal?

2. Should the *Sheriff's Deed on Execution and Order of Sale* be declared null and void?

3. Should any and all orders confirming the sheriff's sale and deed be vacated?

LEGAL AUTHORITY

Jack Stein seeks a straightforward application of Superior Court Civil Rule 60:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: ...
>
> (6) The judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; ...
>
> (11) Any other reason justifying relief from the operation of the judgment.

No one can reasonably debate that evidence of four felony convictions is highly prejudicial evidence against a defendant in a civil case. A party offering such evidence faces a significant hurdle. Even if the evidence has substantive relevance, it is inadmissible unless the Court first makes a specific finding that the probative effect of the evidence is not outweighed by the danger of unfair prejudice. *State v. Lough*, 125 Wn.2d 847,

889 P.2d 487 (1995), *construing* ER 403 and 404.

The danger of unfair prejudice is magnified beyond all bounds when a jury is informed of convictions that are later reversed on appeal. Evidence of this sort is, beyond any reasonable doubt, unfair and prejudicial.

Jack Stein stands before this Court convicted of no crime. The judgment, sheriff's sale and deed, and order confirming the sheriff's sale and deed should therefore each be set aside.

RESPECTFULLY SUBMITTED this 3rd day of May 1999.

/s/ THOMAS CLINE
Attorney for Jack Stein

SUPERIOR COURT OF WASHINGTON
FOR CLARK COUNTY

MARLENE WINCHESTER, personal representative of the Estate of Thelma Lund, Plaintiff,	)	
v.	)	No. 88-2-03442-1
JOHN KENNETH STEIN, et al., Defendants.	)	

STIPULATION AND ORDER TO VACATE
JUDGMENT, VOID SHERIFF'S SALE AND DEED,
VACATE CONFIRMATION ORDER,
AND DISMISS CLAIM
MAY 3, 1999

THIS MATTER having come before the Court upon *Jack Stein's Motion to Vacate Judgment, Void Sheriff's Sale and Deed, and Vacate Confirmation Order*, and the interested parties having stipulated and agreed to entry of the subjoined order, as evidenced by the signatures of their respective attorneys, now therefore, it is hereby

ORDERED, ADJUDGED AND DECREED as follows:

1. The judgment entered in favor of the plaintiff and against John Kenneth Stein, a.k.a. Jack Stein, on the 25th day of February 1991

(Clark County Judgment No. 91-9-00590-6) should be, and it hereby is, vacated *ab initio*;

2. The sale conducted by the Clark County Sheriff on the 7th day of August 1992 in execution of the aforementioned judgment and the subsequent *Sheriff's Deed on Execution and Order of Sale* of the 7th day of November 1994 should be, and they hereby are, declared to be null and void, subject to further court review;

3. Any and all orders entered herein confirming the aforementioned sheriff's sale and deed should be, and they hereby are, vacated; and

4. Plaintiff's claims against defendant Jack Stein should be, and they hereby are, dismissed with prejudice and without fees or costs to either party.

DATED this 3rd day of May 1999.

/s/ H. JOHN HALL
Superior Court Judge